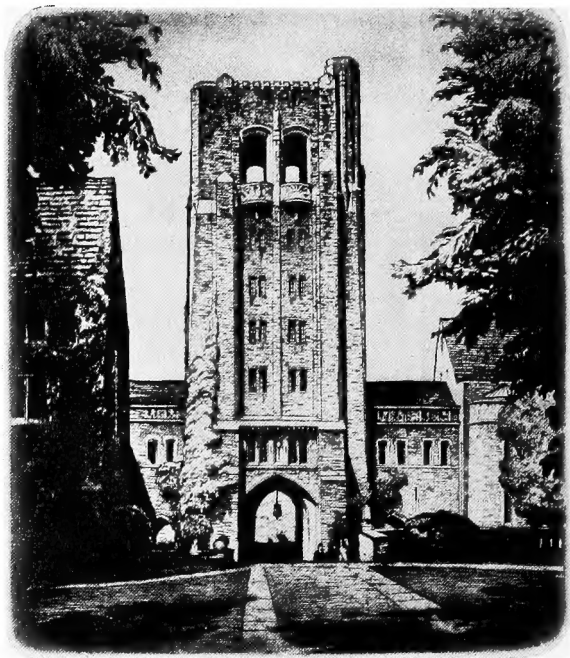


A FEDERAL EQUITY SUIT

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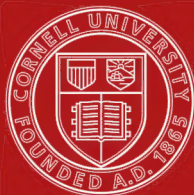
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A FEDERAL EQUITY SUIT

W. S. SIMKINS,

Professor of Law in the University of Texas
Austin, Texas.

THIRD EDITION

ROCHESTER, N. Y.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

1916

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DEDICATION

IN LOVING MEMORY OF MY BROTHER

JUDGE E. J. SIMKINS

PREFACE TO THIRD EDITION.

The entire change of the rules of practice in the equity courts of the United States, which went into effect February 1, 1913, has made it necessary to issue a new edition of this work. I have endeavored to explain the nature and purpose of the radical changes made by the Supreme Court, and where without any court construction of any particular rule, I have sought to give such construction as would tend to conform it to the stated purpose of the changes made; to wit, to expedite the trial of causes in equity in the Federal courts.

I am not sure that abolishing the verification of pleadings except in very special causes, and permitting the defendant to state as many defenses, regardless of consistency, as he deems essential, or to set up any set-off or counterclaim without reference to the subject-matter of the original bill, will promote the purpose or have the desired effect sought by the changes made. It seems to tend to reducing equity pleading to a written wrangle, and obscuring the purpose and issues of the original bill, thereby delaying instead of expediting the trial of the cause. No important changes have been made in the jurisdiction of the courts, or the removal of causes, or in appeals, so no changes of importance have been made necessary in the original text, other than bringing the authorities down to date.

I must acknowledge my indebtedness to Dr. G. C. Butte, of the University of Texas, and to the official staff of the Lawyers Co-operative Publishing Company, for valuable aid in preparing the edition for publication.

I send the book forth, hoping it will aid the courts and the Bar in reaching a construction of the new rules that will make them efficient instruments in securing speedy trials in equity.

Your obedient servant,

W. S. SIMKINS,

Professor of Law in the University of Texas.

PREFACE TO FIRST EDITION.

It is provided by an act of Congress that the practice, pleadings, and forms and modes of proceeding existing at the time in like causes *other than equity*, and admiralty causes in the Circuit and District Courts of the United States, shall conform, as near as may be, to the practice, forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such United States Circuit and District Courts are being held, any rule of the court to the contrary notwithstanding. On the law side of the Federal courts, then, it is presumed that the profession in each State would be reasonably familiar with the practice, forms, and modes of proceeding required by this act.

On the equity side, however, the practice, forms, and mode of procedure are governed, first, by acts of Congress; second, by rules promulgated by the Supreme Court in subordination to the acts of Congress; and third, by such local rules as may be promulgated by the Circuit Court of Appeals, and the Circuit and District Courts, in subordination to the acts of Congress and rules promulgated by the Supreme Court.

Whatever may be one's familiarity with the practice on the law side of the Circuit Court of the United States, he can derive very little aid or assistance if called upon to prosecute a suit on the equity side of this court.

It was to meet this condition that I prepared a series of lectures "On a Suit in Equity in the Federal Courts" for the instruction of the Senior Classes in the Law Department of the University of Texas.

I have been induced to publish them in book form, because, I believe, in these lectures may be found a reasonable solution of any doubt one may have as to any question of practice or procedure in the prosecution of an equity suit in the Federal courts.

I have sought to show, as briefly as possible, not only what should be done, but how to do it; that is, I have not only dis-

cussed each step to be taken in a suit in equity, from filing the bill until it reaches the Supreme Court of the United States, but I have indicated forms which may be used in the successive steps to be taken in its progress.

Much that has been written is the result of my personal experience and observation in a practice of many years in the equity courts of the Federal system.

In many instances it has been exceedingly difficult to extract the true rule to be applied, because of conflicting opinions of Federal judges, sometimes based on grounds reasonably calculated to create dissent; while in many other cases conflict has been created by the refusal of the judges to follow the rules, or recognize any limitation to their discretion.

In such cases doubt has been created as to the true rule, and it has tended to emphasize a somewhat prevalent idea that what you may or may not do in a Federal court of equity depends on the condition of the judge's conscience, and not on rule.

However, in every instance when rules have been set aside to reach a conclusion, I have considered the decision as only the law of that particular case, and not as precedent; and, in such cases, I have exercised my best judgment in reaching the correct rule of practice.

In presenting this book to my brethren of the Bar, let it be borne in mind that it has no pretensions to cover the field of Federal practice, except in so far as the jurisdiction of the Federal courts may be involved, but it is sent forth only as a modest guide through the intricacies of a suit in equity in the Federal courts, and any fair criticism that will correct my errors will be sincerely appreciated by

Your obedient servant,

W. S. SIMKINS,

Professor of Law in the University of Texas.

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A FEDERAL EQUITY SUIT.

CHAPTER I.

THE FEDERAL SYSTEM.

It is not my purpose to discuss the inconvenience and perhaps uselessness of a divided system of law and equity in the administration of justice in the Federal courts. It may be that it is adhering to a practice too vague and shadowy for the eye of common sense to perceive its utility; it may be that such a division has introduced discrepancies, fluctuations, and even anomalies in the whole tenor of our laws; it may be that equity as a supplement to the imperfections of the common law should be blended with it to perfect judicial procedure; it may be that the tenacity with which the Federal system has retained a divided practice, long since abandoned by those from whom we inherited it, is unaccountable and astonishing; and, lastly, it may be that the chasm between law and equity, as administered by the Federal courts, is an unnecessary pitfall to the lawyers in the States having a blended system in practice and procedure, when they seek admission or are removed to the Federal courts; and it may be that if it were in their power they would break this graven image in the Federal temple of justice; yet the fact obstinately faces them, that the condition is a reality, and theorizing on a better method is useless. We have with us a system which recognizes the distinction between law and equity in practice and procedure, and the possibility of a change to

conform to our blended system may be in the womb of the future, but no shadow is yet cast telling of the coming event. Taking into consideration this fact, and the vast jurisdiction of the Federal courts, the profession, instead of shrinking from contact with the system, should be pressing forward to master its intricacies.

These courts have original cognizance of all suits of a civil nature, both in law and equity, concurrent with the courts of the State, subject to certain limitations. The limitations as they now exist require that the matter in dispute exceeds the sum of three thousand dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States, or treaties made, or to be made; between citizens of different States; between citizens of a State and foreign States, citizens and subjects; and between citizens of the same State claiming land under a grant from a different State.

It will be seen that a Federal court has jurisdiction concurrent with the courts of the State between citizens of a State when a Federal question arises dependent upon a proper construction of the Constitution, laws or treaties of the United States; between citizens of a State and citizens of other States; between citizens of a State and aliens in any matter of dispute within the rule of value and amount as above stated. The provision for jurisdiction between citizens of a State claiming land under a grant from a different State has no application in many States.

It will be seen that the field of jurisdiction of these courts, applicable alike to common law and equity, is of vast extent; then consider with it that Texas is only in its swaddling clothes of development, and her possibilities must be developed by foreign capital, whose citizens and subjects would be anxious to escape the local influence connected with our State courts in the event of litigation, and you may catch a glimpse of the trend and extent of the litigation of the future, and into what jurisdiction it will be naturally drawn.

Again, consider the illimitable reach of that Federal octopus commonly known as the 14th Amendment to the Constitution of the United States, which keeps up the flood-tide of Federal litigation, and of which it was said by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, "Though

it has been in the Constitution of the United States but a few years, the docket is crowded with cases in which the court is asked to hold that a State court or a State legislature has deprived someone of property without due process of law."

This distinguished jurist goes on to say that "there seems to be some strange misconception of its scope and power," and he intimates that it is looked upon as a means of bringing into the Federal court, the abstract opinion of every unsuccessful litigant in a State court, and the merits of the State legislation upon which it was founded, for its decision.

This apparent rebuke to the profession has never checked the volume or variety of the questions that seek protection under this particular Federal wing. Out of the cases in which the Amendment has been set up in one form or another, there has been deduced this rule: That the action which may be obnoxious to the 14th Amendment does not mean simply legislative action, but applies to all instrumentalities and agencies officially employed in the execution of the law down to the point where personal and property rights of a citizen are touched, and whether the agencies of the State be executive, legislative, or judicial. *Rogers v. Alabama*, 192 U. S. 231, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Scott v. McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

In addition to this vast field of concurrent jurisdiction, thus briefly alluded to, there is an extensive exclusive jurisdiction which will be referred to hereafter.

The System is Fixed by the Constitution.

But it may be asked, What is the objection to administering this jurisdiction under the blended system familiar to the profession of many of the States? The reply is that the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States.

By article 3, section 2, of the Constitution, it is provided

that the judicial power of the United States shall extend to all cases, both in *law* and *equity*, arising, etc. *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655.

The 7th Amendment recognizes again the distinction between law and equity by declaring that in suits at *common law* the right of trial by jury shall be preserved.

The 11th Amendment declares the judicial power shall not be construed to extend to any suit in law and equity prosecuted against the State.

These articles of the Constitution have been construed to be a clear recognition that law and equity should be administered separately in the Federal system.

From the passage of the act creating the Federal system, in 1789, to the last jurisdictional act in 1888, the jurisdiction of the United States courts has been declared to extend to all suits of a civil nature, both in *law* and *equity*, and in the act of September 24, 1789, embodied in U. S. Rev. Stat. sec. 723, it is declared that suits in equity shall not be sustained in the United States courts in any case where a plain, adequate, and complete remedy at law may be had.

In section 913 of U. S. Rev. Stat. Comp. Stat. 1913, sec. 1536, passed in 1789, and amended in 1792, and known as the process act, it is provided that the forms and mode of procedure in equity shall be according to the rules and usages of courts of equity; and section 917, U. S. Rev. Stat., gives power to the Supreme Court of the United States to prescribe rules of practice in courts of equity.

In construing these various statutes recognizing the distinct nature of these courts and a distinct procedure for each, they have been declared to be but a recognition of the constitutional requirements in organizing the Federal system.

It has been repeatedly stated by the Supreme Court that the State legislation could not change it, and that "suits in equity" as designated by the Constitution were suits in which relief was sought in accordance with the principles and practice of equity jurisdiction as established in the High Court of Chancery in England. *Alger v. Anderson*, 92 Fed. 700; *Blackburn v. Selma, M. & M. R. Co.* 3 Fed. 692, 693; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 462, 15 L. ed. 450; *Mississippi Mills v. Cohn*, 150 U. S. 205, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75.

In the early case of *Robinson v. Campbell*, 3 Wheat. 212, 4 L. ed. 372, the question arose whether a mere equitable title could be set up as an answer in ejectment. Justice Todd, in rejecting the defense, says: "The acts of Congress have distinguished between common law and equity, and the courts of the United States must administer remedies, not according to the practice of the State courts, but according to the principles of common law and equity as distinguished and defined in that country from which the knowledge of the principles came."

In *Bennett v. Butterworth* (a Texas case), 11 How. 669, 13 L. ed. 859, Taney, Chief Justice, says: Whatever may be the laws of Texas with reference to pleading and practice, they cannot govern the United States courts to such an extent as would confound the principles of law and equity, or admit the blending of legal and equitable defenses in the same suit. He further declares, "that the Constitution of the United States, creating and defining the judiciary powers of the national government, establishes the distinction between law and equity; and if the suit be an equitable one it must proceed under equitable rules prescribed for the courts of the United States."

Equity jurisdiction, then, is vested, as a part of the judicial power of the Federal government, in separate courts by the Constitution and acts of Congress. (*Fenn v. Holme*, 21 How. 484, 485, 487, 16 L. ed. 199, 200; *Berkey v. Cornell*, 90 Fed. 717; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Noonan v. Lee* (*Noonan v. Braley*) 2 Black, 509, 17 L. ed. 281) and the distinction is recognized as a matter of substance, as well as of form and procedure. *Green v. Mills*, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 857; *Owens v. Heidbreder*, 24 C. C. A. 362, 41 U. S. App. 736, 78 Fed. 837; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; *Gravenberg v. Laws*, 40 C. C. A. 240, 100 Fed. 4; *Berkey v. Cornell*, *supra*. But not only is this true, but the Federal courts have been extremely jealous to guard the equity jurisdiction against limitation or restraint by reason of State legislation creating or limiting remedies. Thus guarded, it is the only court in the United States that maintains uniformity in practice and procedure in all of the States, and in this respect the only national court in the whole judicial system. McManus

v. Chollar, 63 C. C. A. 454, 128 Fed. 902; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 21; Louisville & N. R. Co. v. Railroad Commission, 157 Fed. 944; Mississippi Mills v. Cohn, 150 U. S. 204, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75; Payne v. Hook, 7 Wall. 430, 19 L. ed. 261; Smith v. Ft. Scott, H. & W. R. Co. 99 U. S. 401, 25 L. ed. 438.

Equity Rule 90, promulgated pursuant to U. S. Rev. Stat. sec. 917, Comp. Stat. 1913, sec. 1543, provides that in the absence of any rule in the Supreme Court, the practice in equity shall be regulated by the *present practice* of the High Court of Chancery in England. This rule was left out of the new rules. See new rule 81. Alger v. Anderson, 92 Fed. 696, 699, but this rule is abrogated by new rule 81.

I have thus called attention to a few of the decisions fixing the status of courts of equity in the Federal system. We have with us, then, a court wherein the practice and procedure differs from our State system. It is a court of vast jurisdiction, and eminently progressive in increasing it. It is guarded from limitation of restraint by State legislation, and whether its practice and procedure are unfamiliar or distasteful to the State Bar or not, there can be no change except through a change in the Federal Constitution, of which there is no reasonable hope. So we face a condition imbedded in Federal jurisprudence, which, I regret to say, many State lawyers have not appreciated, but have been disposed to look upon it with sensitive prejudice, and disinclined to approach it with any desire to master its practice or understand its procedure. For some reason the tendency has been to look upon it as a foreign court in our midst; out of harmony with the system familiar to us; and arousing our jealousy as year by year we have watched it plume its wings for bolder flights of jurisdiction. This should not be; this court is a part of the judicial system, and as much an instrument of remedial justice in every State as the State courts, and we should so recognize it, and, rather than ignore or resist, should equip ourselves to intelligently direct its great powers within the limitations of the Constitution.

Our State Constitutions declare "the Constitution and laws of the United States to be the supreme law of the land," and to

preserve that supremacy it became necessary to provide a judicial system, and vest in it a jurisdiction that could best effect this purpose. Const. of U. S. art. 6, cl. 2, also declares this supremacy. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 171; *Whitten v. Tomlinson*, 160 U. S. 238, 40 L. ed. 410, 16 Sup. Ct. Rep. 297; *Osborn v. Bank of United States*, 9 Wheat. 818, 6 L. ed. 223.

The wisdom of our fathers created the system, great judges have given to it shape and form, and though, viewed from its modern surroundings, there appears quaintness and want of harmony with our ideas, yet it is none the less efficient in securing justice, for which alone we should strive.

I will remark in passing that our blended system of administering law and equity has not escaped criticism, and I will briefly refer to some expressions of the Supreme Court of the United States in which its efficiency has been doubted.

Several of the early cases in which the Supreme Court of the United States was called upon to define the separate jurisdictions of law and equity, went up from Texas, as it was somewhat of a pioneer in this blended procedure. In *Green v. Custard*, 23 How. 484, 16 L. ed. 471, the court said: "Because the case originated in the courts of Texas the counsel were permitted to turn it into a written wrangle, instead of requiring them to plead as lawyers in a court of law." The court further said it had occasion to notice before the consequences resulting from this hybrid system of pleading being permitted in the administration of justice in that State. The reference was to *Randon v. Toby*, 11 How. 493, 13 L. ed. 784, and *McFaul v. Ramsey*, 20 How. 523, 15 L. ed. 1010. Concluding, the court says: "The case at bar adds another example of utter perplexity and confusion of mind introduced into the administration of justice by practice under such methods." In *Jones v. Mc-Masters*, 20 How. 8, 15 L. ed. 805, the court said that many of the cases at law coming up from that State are greatly embarrassed from the want of observance of the distinction between law and equity. I allude to these cases, not only to show that there is not an universal appreciation of our blended system, but to show the spirit of our ancestors during the formation period of the Federal system, and why they have handed down to us the divided system of practice and procedure.

Since the above was written Congress by act of March 3d, 1915, adding section 274 (b) to the Judicial Code, has provided that in all actions at law equitable defenses may be interposed by answer, plea, or replication; the defendant having the same rights as if he had filed a bill in equity embodying the defense and seeking relief where affirmative relief is thus sought in a suit at law, the plaintiff must put the facts alleged in issue by filing a replication, and review of the judgment or decree may be by error or appeal.

The distinction between law and equity, which from the foundation of the government has been declared to be, under the Constitution of the United States, a matter of substance as well as of form and procedure (*Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859), has been seriously modified by this act permitting the blending of legal and equitable claims in a suit at law; for, as seen, it specifically provides that affirmative equitable relief may be set up in the lawsuit by answer, plea, or replication.

Is the act constitutional? See *Schurmeier v. Connecticut Mut. L. Ins. Co.* 96 C. C. A. 107, 171 Fed. 16, in which it is declared "that no legislative act can change it," and authorities there cited. See dicta in *Whitcomb v. Shultz*, 138 C. C. A. 510, 223 Fed. 275.

CHAPTER II.

MAXIMS.

As to what are matters of equitable cognizance, such as equitable titles, rights, and interests, it is not intended to discuss in these lectures, further than to illustrate the practice and procedure in the conduct of a suit in equity in the Federal courts. The distinctive principles upon which general equity jurisdiction rests, and the nature, character, and extent of the jurisdiction, has already been discussed in my lectures on Equity Jurisprudence. I have endeavored to state there the rules by which you are to test the facts in hand, and by which you may conclude with reasonable certainty whether your cause of action be of equitable cognizance or not.

I am now attempting only a modest guide through the apparent intricacies of a suit in equity in a Federal court, and therefore I shall principally speak of the practice and proceedings which regulate this character of suit, from the filing of the bill to the final decree; that is, I take up the procedure after you have determined that your cause of action is an equitable one, and proceed with it to a final decree in the courts of last resort. Before entering into the successive steps to be taken in a suit on the equity side of the Federal court, it is necessary to refresh your memories as to certain conditions that must exist to give you any standing in a court of equity, even though your cause of action be an equitable one, and in this connection to especially call your attention to section 723 of the Revised Statutes of the United States, which embodies in mandatory form an ancient rule of equity jurisdiction.

The conditions referred to are contained in the maxims of equity, which I will here restate:

First. You must come into equity with clean hands. *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008, 1015;

Camors-McConnell Co. v. McConnell, 140 Fed. 412, 72 C. C. A. 681, 140 Fed. 987; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Creath v. Sims, 5 How. 204, 12 L. ed. 117.

Second. In asking equity you must have done or prepared to do equity. Stewart v. Wright, 77 C. C. A. 499, 147 Fed. 346; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 535, 33 L. ed. 1024, 10 Sup. Ct. Rep. 604; McQuiddy v. Ware, 20 Wall. 14, 22 L. ed. 311; Hager v. Thomson, 1 Black, 94, 17 L. ed. 45; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Willard v. Tayloe, 8 Wall. 569, 19 L. ed. 504; Duff v. Hopkins, 33 Fed. 609; Neblett v. MacFarland, 92 U. S. 101, 23 L. ed. 471.

Third. Equity considers that done which ought to have been done, and that left undone which ought not to have been done. Taylor v. Longworth, 14 Pet. 172, 10 L. ed. 405; Warner v. New Orleans, 31 C. C. A. 238, 59 U. S. App. 131, 87 Fed. 829; Morris v. United States, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649; Moore v. Crawford, 130 U. S. 128, 32 L. ed. 880, 9 Sup. Ct. Rep. 447; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779.

Fourth. Equality is equity. United States Rubber Co. v. American Oak Leather Co. 181 U. S. 434, 45 L. ed. 938, 21 Sup. Ct. Rep. 670; Glover v. Patten, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411.

Fifth. When equities are equal the first in time prevails. Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; FitzSimmons v. Ogden, 7 Cranch, 2, 3 L. ed. 249; Louisiana v. Mississippi, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571; Neslin v. Wells, F. & Co. 104 U. S. 428, 26 L. ed. 802.

Sixth. When equities are equal the law prevails. Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; Simmons v. Ogle, 105 U. S. 278, 26 L. ed. 1090.

Seventh. Equity aids the vigilant, not those who slumber upon their rights. New York v. Pine, 185 U. S. 98, 46 L. ed. 823, 22 Sup. Ct. Rep. 592; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Wetzel v. Minnesota R. Transfer Co. 12 C. C. A. 490, 27 U. S. App. 594, 65

Fed. 26; *Citizen's Sav. & T. Co. v. Belleville & S. I. R. Co.* 84 C. C. A. 577, 157 Fed. 73.

Eighth. Equity follows the law. *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 669; *Magniac v. Thompson*, 15 How. 281, 14 L. ed. 696; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Gamewell Fire-Alarm Teleg. Co. v. Laporte*, 42 C. C. A. 405, 102 Fed. 420.

Ninth. Equity finds a remedy for every wrong. *Southern California v. Rutherford*, 62 Fed. 797; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania*, 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 741.

The application of these maxims were illustrated in my equity lectures by both Federal and State authority, and it was made apparent that a clear comprehension of their meaning was necessary in solving any doubts as to the proper remedy. So, without further observation on these maxims, I will proceed at once to the discussion of section 723 of the Revised Statutes of the United States.

Section 723.

This statute is one of the principal tests of jurisdiction in equity, that is, it is axiomatic in its nature, and universal in its application, and is in these words: "Suits in equity shall not be sustained in either of the courts of the United States [circuit and district] in any case where a plain, adequate, and complete remedy may be had at law." This act is held to control procedure in Federal courts. *Jones v. Mutual Fidelity Co.* 123 Fed. 506; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767.

This rule is the test of equitable jurisdiction. *Ibid.*; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 207, 215-216, 26 L. ed. 981, 984; *Hartford F. Ins. Co. v. Bonner Mercantile Co.* 11 L.R.A. 623, 44 Fed. 155; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 302.

The rule is as old as the recorded history of chancery courts of England. *Payne v. Kansas & A. Valley R. Co.* 46 Fed. 552; *Lewis v. Cocks*, 23 Wall. 470, 23 I. ed. 71, from whence the Federal system was derived. See Equity rule 90; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 462, 15 L. ed.

450; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742. It grew out of the failure of the common law to meet new social conditions, and the refusal of the common-law courts to apply remedies to wrongs arising out of the complex rights and duties of an advancing civilization. As said by Mr. Pomeroy: "The common-law courts were closed against a large and ever increasing class of rights and remedies, and a distinct tribunal, with a broader and more flexible jurisdiction and mode of procedure, became absolutely necessary, or else justice had to be denied." Pom. Eq. Jur. 3d ed. § 23. Whatever may have been its origin, it came to us with the system of equity practice of the High Court of Chancery which this country adopted, as shown by Equity Rule 90. *Boyle v. Zacharie*, 6 Pet. 658, 8 L. ed. 536; *Lewis v. Shainwald*, 48 Fed. 493; as to the force of rule 90, *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261.

It may be asked, then, why did Congress emphasize the rule by embodying it in an act, and in the particular mandatory form in which it appears, as, "Suits in equity *shall not*," etc.? The language was intended to impress upon the Federal judges that the rule should be construed in the light of the 7th Amendment to the Constitution of the United States, guarantying trial by jury in all matters not clearly of equitable cognizance. This Amendment was contemporaneous with the passage of the act embodying section 723; that is, the Amendment was proposed five days after the passage of the act. *Alger v. Anderson*, 92 Fed. 700; *Parsons v. Bedford*, 3 Pet. 446, 7 L. ed. 736; *Grether v. Wright*, *supra*; *Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 838; *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Wehrman v. Conklin*, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129.

Trial by jury in civil as well as criminal cases was among the privileges our ancestors most cherished, and it found expression in this 7th Amendment to the Federal Constitution in the following words: "In all suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The mandatory form of section 723 was intended to breathe somewhat the spirit of this Amendment, and require a liberal construction in behalf of the

right to have issues of fact determined by a jury, instead of by a chancellor (*Whitehead v. Shattuck*, 138 U. S. 150, 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Scott v. Neely*, 140 U. S. 109, 35 L. ed. 359, 11 Sup. Ct. Rep. 712; *Strang v. Richmond, P. & C. R. Co.* 93 Fed. 74, 75), because every case construed to be within the jurisdiction of equity virtually withdrew the issues from trial by a jury, as in cases in chancery both fact and law were determined by a chancellor. U. S. Rev. Stat. sec. 648, Comp. Stat. 1913, sec. 1584.

True, a chancellor may send issues of fact to a jury at his pleasure, but the finding is only advisory, or for his information, which he may regard or not, for he is in no way bound by it. *Flippen v. Kimball*, 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. 258; *Oil Well Supply Co. v. Hall*, 63 C. C. A. 343, 128 Fed. 878; *Wilson v. Riddle*, 123 U. S. 615, 31 L. ed. 283, 8 Sup. Ct. Rep. 255; *Perego v. Dodge*, 163 U. S. 165, 41 L. ed. 117, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 496.

By act of 1875 (1 U. S. Rev. Stat. Supp. 1874-1881, p. 136, sec. 2) it is specially provided that courts of equity in patent causes may impanel a jury of from five to twelve men to examine issues of fact, but the verdict has no greater force than as stated above.

Again, the power of the chancellor in England, through equitable processes and inventions, was ever an expanding one, and tending to suppress jury trials, and it was reasonable to suppose that this object lesson inspired the mandatory form of the Federal statute, and was an effort to restrict this ancient jurisdiction. That this spirit, or purpose, of our forefathers has imbued either the minds or hearts of our Federal judges in perfecting the Federal equity system which now overshadows the jurisprudence of these United States, has at least been doubted by one of the great political parties of this country, if we may judge from its battle cry of "down with government by injunction."

The Federal courts were called upon to construe this section 723 at a very early period, and we find in *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655, Mr. Justice Johnson saying, "that

since its passage in 1789 the court has been often called upon to construe this article, and has as often held it '*declaratory only*,' making no alteration whatever in the rules of equity on the subject of legal remedies." Mr. Justice Story, in *Bean v. Smith*, 2 Mason, 270, Fed. Cas. No. 1,174, says: "Section 723 is in no sense intended to narrow the jurisdiction of courts of equity as to proper subjects of relief in the courts of equity in England, the reservoir of our system." *Alger v. Anderson*, 92 Fed. 696, 697. Sixty years after the Supreme Court in *Wehrman v. Conklin*, *supra*, says "that section 723 has never been regarded as restricting the ancient jurisdiction of courts of equity or to prohibit their exercise of concurrent jurisdiction with courts of law, where such jurisdiction has been previously upheld." Thus we see that the Supreme Court has adhered to the construction that this section was only "declaratory," and that its mandatory form was only intended to impress the ancient rule, but not thereby to restrict the ancient jurisdiction of the courts of equity as exercised by the chancery courts of England. *Salton Sea Cases*, 97 C. C. A. 214, 172 Fed. 792; *Grether v. Wright*, *supra*; *Pittsburgh, C. & St. L. R. Co. v. Keokuk, & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 20; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55.

With this general view of section 723 I will now proceed to discuss its principal features and how it is to be set up as a defensive pleading. I will divide the discussion into four heads, as follows:

First. Construction of the words "remedy at law."

Second. Construction of the words "plain, adequate, and complete."

Third. When it must be set up to be effective as a defense.

Fourth. When a court of equity will act, though not set up as a defense.

CHAPTER III.

"REMEDY AT LAW."

These words refer to the common law, and not the statute law of a State, and it has been uniformly held to have reference to the common law as it existed in 1789, when the section was passed. *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55, 56; *McConihay v. Wright*, 121 U. S. 206, 30 L. ed. 933, 7 Sup. Ct. Rep. 940; *Green v. Turner*, 98 Fed. 756; *H. B. Claflin Co. v. Furtick*, 119 Fed. 433; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Jones v. Mutual Fidelity Co.* 123 Fed. 507, 520.

Thus in *Robinson v. Campbell*, 3 Wheat. 212, 4 L. ed. 372, it is said that the "remedy at law," used in the statute, meant remedies known to the common law when the act was passed in 1789 (*Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 20, 21; *Alger v. Anderson*, 92 Fed. 697; *McConihay v. Wright*, *supra*), such as, ejectment, debt, covenant, detinue, assumpsit, replevin, and trespass.

The Federal courts have refused to recognize any change made by the statutes of the various States in these remedies when testing their jurisdiction under this act. *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; *Alderson v. Dole*, 20 C. C. A. 280, 33 U. S. App. 460, 74 Fed. 30; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Smyth v. Ames*, 169 U. S. 516, 42 L. ed. 838, 18 Sup. Ct. Rep. 418.

The rule may be stated as follows: If according to the common law in 1789 a right was legal, no subsequent declaration of a State statute, declaring it equitable, could give jurisdiction to the equity courts of the Federal system, and if the

right was equitable, no State law declaring it a legal right would deprive the Federal equity courts of jurisdiction. *Alger v. Anderson*, 92 Fed. 697; *Whitehead v. Entwistle*, 27 Fed. 781; *Mississippi Mills v. Cohn*, 150 U. S. 204, 205, 37 L. ed. 1053, 1054, 14 Sup. Ct. Rep. 75.

To illustrate the rule: A located land certificate in Texas has been declared by the State supreme court a legal right (*Adams v. House*, 61 Tex. 639; *Dupree v. Frank* [Tex. Civ. App.] 39 S. W. 994); yet if an action is brought on that certificate in the Federal courts to try title, you must sue on the equity side. If the legislature had declared that the certificate was a legal right, it would not give jurisdiction to a Federal court of law, nor deprive its equity courts of jurisdiction, because the essential nature of a certificate for land is only an equitable right, which legislation cannot change, unless it be an act of Congress. *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Schoolfield v. Rhodes*, 82 Fed. 153; *Scott v. Neely*, 140 U. S. 110, 111, 35 L. ed. 360, 361, 11 Sup. Ct. Rep. 712; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Fenn v. Holme*, 21 How. 484-487, 16 L. ed. 199, 200.

Again, the rule is thoroughly settled that to oust the jurisdiction of a court of equity the remedy at law must be such as is known to the Federal courts, and it must be a remedy at law in the Federal courts (*Coler v. Stanley County*, 89 Fed. 260; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761-765; *Scott v. Neely*, 140 U. S. 111, 35 L. ed. 360, 11 Sup. Ct. Rep. 712; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418), that is, a remedy existing in 1789, and known to the common law. We have, then, the remedies in Federal courts at common law or equity, "according to the essential character of the case," and to be determined in the light of the jurisdiction of the High Court of Chancery and common-law courts of England in 1789, the date of the judiciary act. *Green v. Turner*, 98 Fed. 756; *Van Norden v. Morton*, 99 U. S. 380, 25 L. ed. 454; *New Orleans v. Louisiana Constr. Co.* 129 U. S. 46, 32 L. ed. 607, 9 Sup. Ct. Rep. 223; *Lindsay v. First Nat. Bank*, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. Rep. 472; *Peck v. Ayers & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 275.

You will see upon examination of the judiciary act of 1789, of which section 723 is a part, it is provided that the laws of the States shall be rules of decision in the Federal courts, but it was early decided that it had no reference to proceedings in equity. Rev. Stat. sec. 721, Comp. Stat. 1913, sec. 1538; *Bucher v. Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 81-84; *Johnston v. Roe*, 1 McCrary, 162, 1 Fed. 695; *Robinson v. Campbell*, 3 Wheat. 223, 4 L. ed. 376; *Pennsylvania R. Co. v. Allegheny Valley R. Co.* 25 Fed. 115; *Peck v. Ayres & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 273; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 138, 30 L. ed. 572, 7 Sup. Ct. Rep. 430; *White v. Bower*, 48 Fed. 188; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 21.

It has been thoroughly settled that the jurisdiction of courts of equity cannot be limited or enlarged by State legislation, nor its general powers affected by such legislation. *McConihay v. Wright*, 121 U. S. 206, 30 L. ed. 933, 7 Sup. Ct. Rep. 941; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 764; *Mississippi Mills v. Cohn*, 150 U. S. 205, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75; *Jones v. Mutual Fidelity Co.*, 123 Fed. 507; *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 379; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Orendorf v. Budlong*, 12 Fed. 26; *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Broderick's Will* (*Kieley v. McGlynn*) 21 Wall. 520, 22 L. ed. 605; *Whitehead v. Shattuck*, 138 U. S. 152, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

While State statutes cannot control the jurisdiction of equity courts in any way by declaring what is a legal or an equitable cause of action, yet it must not be understood that the Federal courts of equity will not enforce new rights and remedies or new remedies for old rights created by State legislation, after it has acquired jurisdiction based upon its own independent grounds of determining it. A Federal equity court has an exceedingly wide discretion in applying remedies, and does not hesitate to enforce new rights or remedies provided by State statutes, if they are substantially consistent with the ordinary modes of chancery proceeding and practice. *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 S. Eq.—2.

Fed. 399, 5 A. & E. Ann. Cas. 314; *Humes v. Little Rock*, 138 Fed. 929; *United States Shipbuilding Co. v. Conklin*, 60 C. C. A. 680, 126 Fed. 135; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Jones v. Mutual Fidelity Co.* 123 Fed. 519; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936; *Land Title & T. Co. v. Asphalt Co.* 62 C. C. A. 23, 127 Fed. 2; *Southern Pine Co. v. Hall*, 44 C. C. A. 363, 105 Fed. 84; *Massachusetts Ben. Life Asso. v. Lohmiller*, 20 C. C. A. 274, 46 U. S. App. 103, 74 Fed. 23.

It has been frequently declared that "a party, by going into the national courts, does not lose any right or appropriate remedy of which he might have availed himself in the State courts in the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453; *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 227; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Cowley v. Northern P. R. Co.* 159 U. S. 582, 40 L. ed. 266, 16 Sup. Ct. Rep. 127. To illustrate: A State law may declare what fact or act is a cloud upon title, and a Federal court of equity will remove it. On the other hand, if the remedy or proceeding authorized by the State court is not consistent with the ordinary modes of equitable proceeding, the Federal court will not enforce it. Thus a State statute authorizing a simple contract creditor to set aside a conveyance made in fraud of creditors will not be enforced in the Federal courts of equity, as, according to the principles of equity, the plaintiff must first reduce his debt to judgment before he can attack a fraudulent conveyance. In a word, the defendant is entitled to a jury to determine the existence of the debt, before it can be made the basis of an equitable proceeding. *Cates v. Allen*, 149 U. S. 451-456, 37 L. ed. 804-807, 13 Sup. Ct. Rep. 883, 977; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. 782; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 379, 37 L. ed. 115, 14 Sup. Ct. Rep. 127; *Hook v. Ayers*, 12 C. C. A. 564, 24 U. S. App. 487, 64 Fed. 661; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 511.

Clark v. Smith, 13 Pet. 195, 10 L. ed. 123, was one of the earliest cases recognizing equitable rights created by State laws, and presents a case where the laws of Kentucky enlarging the remedy for quieting title by one in possession was enforced by the Federal court; and since that time many cases have followed, enforcing new rights and remedies provided by State laws. Holland v. Challen, 110 U. S. 21, 28 L. ed. 54, 3 Sup. Ct. Rep. 495; Greeley v. Lowe, 155 U. S. 58-75, 39 L. ed. 69-75, 15 Sup. Ct. Rep. 24; Grether v. Wright, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 746; Harding v. Guico, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 164; Bardon v. Land & River Improv. Co. 157 U. S. 330, 39 L. ed. 720, 15 Sup. Ct. Rep. 650; Darragh v. H. Wetter Mfg. Co. 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 14; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 361, 43 L. ed. 477, 19 Sup. Ct. Rep. 179; Lilienthal v. Drucklieb, 80 Fed. 563; Cowley v. Northern P. R. Co. 159 U. S. 582, 40 L. ed. 266, 16 Sup. Ct. Rep. 127; Reynolds v. Crawfordsville, 112 U. S. 410, 411, 28 L. ed. 735, 736, 5 Sup. Ct. Rep. 213; Chapman v. Brewer, 114 U. S. 170, 171, 29 L. ed. 87, 88, 5 Sup. Ct. Rep. 799. But to do this certain conditions must exist, to wit, the new right and remedy given by statute must not involve in its enforcement the blending of legal and equitable remedies, nor should the new equitable remedy infringe on the right of trial by jury. Thompson v. Central Ohio R. Co. 6 Wall. 137, 18 L. ed. 767; Hurt v. Hollingsworth, 100 U. S. 103, 25 L. ed. 570; Scott v. Armstrong, 146 U. S. 512, 36 L. ed. 1063, 13 Sup. Ct. Rep. 148; Greeley v. Lowe, 155 U. S. 75, 39 L. ed. 75, 15 Sup. Ct. Rep. 24; Wehrman v. Conklin, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129; Scott v. Neeley, 140 U. S. 110, 35 L. ed. 360, 11 Sup. Ct. Rep. 712; Cates v. Allen, 149 U. S. 456, 37 L. ed. 807, 13 Sup. Ct. Rep. 883, 977.

A statute of a State declaring a right that would exist without the statute will be enforced by the Federal courts at law or in equity as it may fall. First Nat. Bank v. Peavey, 69 Fed. 457, and authorities cited.

Federal Common Law.

It may be asked, in determining this remedy at law, if there

is no Federal common law as distinct from the common law of England and as it exists in the States. It is said in *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 101, 45 L. ed. 770, 21 Sup. Ct. Rep. 561, that there is no body of Federal common law separate and distinct from the common law existing in the several States. *Wheaton v. Peters*, 8 Pet. 658, 659, 8 L. ed. 1079, 1080; *Smith v. Alabama*, 124 U. S. 478, 31 L. ed. 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *United States v. Wong Kim Ark*, 169 U. S. 655, 42 L. ed. 893, 18 Sup. Ct. Rep. 456; *Pennsylvania v. Wheeling B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

In *Murray v. Chicago & N. W. R. Co.* 62 Fed. 24, Judge Shiras, in an elaborate discussion of the conditions under which the common law of England was adopted and modified to suit the surroundings of the Colonies, says that the adoption of the Constitution and the creation of our national government with its coordinate branches did not abrogate the common law or deprive the people of its benefits, and the Federal courts are called upon to apply its rules whenever the particular case requires it, where there is no statute or other obligatory rule of decision. *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. See *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 859.

While it is said that the United States has no "common law" distinct from the common law of England as adopted by the several States, yet in the light of the various decisions of the Federal courts, it seems the statement can be challenged. These courts have created a body of "general law," notably in interstate commercial transactions; liability of railroads to servants; the "lex mercatoria" etc.; and in matters of concurrent jurisdiction they have not hesitated to administer the law independent of the decisions of State courts in many instances. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 370, 37 L. ed. 773, 13 Sup. Ct. Rep. 914; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Swift v. Philadelphia & R. R. Co.* 5 Inters. Com. Rep. 116, 64 Fed. 65; *Ells v. St. Louis, K. & N. W. R. Co.* 52 Fed. 903 and cases cited; *Murray v. Chicago N. W. R. Co.*

supra. See *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627.

Without multiplying cases, it will be clearly seen that the Federal courts enforce "a common law," at least they have established rules of action independent of congressional or State laws and decisions, for the government and security of persons and property, which is the definition of "common law" as given by Kent.

A Federal court is not bound by the decision of a State court as to what the common law is. *Hocking Valley R. Co. v. New York Coal Co.* 132 C. C. A. 387, 217 Fed. 731.

CHAPTER IV.

"PLAIN, ADEQUATE, AND COMPLETE."

The statute requires that in order to oust the jurisdiction of equity there must not only be a remedy at law, but it must be "plain, adequate, and complete." Section 723, now sec. 267, new Judicial Code, Comp. Stat. 1913, sec. 1244. *Farwell v. Colonial Trust Co.* 78 C. C. A. 22, 147 Fed. 480; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1; *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723; *Wiemer v. Louisville Water Co.* 130 Fed. 246; *Monmouth Invest. Co. v. Means*, 80 C. C. A. 527, 151 Fed. 160; *Miller v. Steele*, 82 C. C. A. 572, 153 Fed. 714; *Wolf v. Lovering*, 86 C. C. A. 281, 159 Fed. 91. This language leaves much to the discretion of the chancellor, and the circumstances of each particular case must control his discretion. *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 396. We have here the "open door" through which the chancellor may escape from the mandatory feature of section 723. The frequent construction of the words "plain, adequate, and complete" has established certain rules by which these courts have been guided in assuming jurisdiction, and are as follows:

First. It is not enough that there be a remedy at law, but it must, in the discretion of the chancellor, be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction in equity. *Barber v. Barber*, 21 How. 591, 16 L. ed. 229; *Tyler v. Savage*, 143 U. S. 95, 26 L. ed. 88, 12 Sup. Ct. Rep. 340; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55; *Bank of Kentucky v. Stone*, 88 Fed. 390; *Smith v. American Nat. Bank*, 32 C. C. A. 368,

60 U. S. App. 431, 89 Fed. 839; *Western Assur. Co. v. Ward*, 21 C. C. A. 378, 41 U. S. App. 443, 75 Fed. 342; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 154; *Brewster v. Lanyon Zinc Co.* 71 C. C. A. 213, 140 Fed. 816.

Second. That the legal remedy, both in respect of the final relief and the mode of obtaining it, must be as efficient in law as in equity. *Ibid.*; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 12, 43 L. ed. 346, 19 Sup. Ct. Rep. 77; *Kilbourn v. Sunderland*, 130 U. S. 505-515, 32 L. ed. 1005-1009, 9 Sup. Ct. Rep. 594; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Schmidt v. West*, 104 Fed. 272. Thus a bill may be brought for a stock of goods in the hands of a collector of customs, because they cannot be replevied (U. S. Rev. Stat. 934, Comp. Stat. 1913, sec. 1560). *Pollard v. Reardon*, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 849. See *His Imperial Majesty v. Providence Tool Co.* 23 Fed. 572.

Third. A court of equity is not justified in declining jurisdiction unless it appears that the legal remedy is neither obscure or doubtful as to its adequacy or completeness. (Authorities above.) However, inadequacy of the remedy at law does not mean that it fails to produce the money, but that in its nature and character it is not fitted or adapted to the end in view. *Thompson v. Allen County*, 115 U. S. 554, 29 L. ed. 473, 6 Sup. Ct. Rep. 140; *Rees v. Watertown*, 19 Wall. 124, 125, 22 L. ed. 77; *Buzard v. Houston*, 119 U. S. 352, 30 L. ed. 453, 7 Sup. Ct. Rep. 249; *Adams v. Murphy*, 91 C. C. A. 272, 165 Fed. 305. Thus, if the suit be for money by way of damages for fraud, a judgment at law is an adequate remedy, even though you may not be able to collect it by the usual process. This latter fact does not make the remedy inadequate within the meaning of § 723, but should the agreement procured by fraud be of a continuing nature, and rescission be necessary for complete relief, in addition to damages sought, then the judgment at law is not adapted to the end in view, and equity will take jurisdiction. *Ibid.*; *Alger v. Anderson*, 92 Fed. 708; *Shields v. McCandlish*, 73 Fed. 320; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 801; *Walker v. Brown*, 58 Fed. 29, 30; *Whitney v. Fairbank*, 54 Fed. 986; *Paton v. Majors*, 46 Fed. 211.

Fourth. A remedy at law is not adequate if it depends on the will of the opposing party. Thus, where an insurance company has delivered a policy through fraudulent representation a court of equity will maintain a suit to have the policy surrendered, and not force the complainant to await a suit at law. In such cases the remedy at law is not as efficient and prompt as in equity. *Schmidt v. West*, 104 Fed. 272, 274; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 397; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Bank of Kentucky v. Stone*, 88 Fed. 383, 391; *Union L. Ins. Co. v. Riggs*, 123 Fed. 317.

Fifth. The remedy at law to be adequate must be a remedy at law in the Federal court, where jurisdiction in equity is sought. *Coler v. Stanley County*, 89 Fed. 257; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Jones v. Mutual Fidelity Co.* 123 Fed. 518; *Brun v. Mann*, *supra*; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 763, 764; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 579, 37 L. ed. 856, 13 Sup. Ct. Rep. 936. It is not enough that there may be a remedy at law in the State courts. *Ibid.*; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 85 C. C. A. 513, 151 Fed. 153, 154; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Smyth v. Ames*, 169 U. S. 517, 42 L. ed. 838, 18 Sup. Ct. Rep. 418; *Schmidt v. West*, 104 Fed. 273. A party is not compelled to go into a foreign jurisdiction to avail himself of it (*United States L. Ins. Co. v. Cable*, *supra*); especially if by going into such jurisdiction he would be deprived of the right of introducing certain evidence that would be admissible in equity; or forfeit any right. *Ibid.*; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 397.

These rules are only suggestions to the chancellor's discretion. No iron-bound rule can be laid down, defining an adequate remedy at law to defeat jurisdiction in equity. The cases above cited show that if there be any fact in a case disabling a party from bringing it fairly and fully before a court of law, as when something is to be done, or some impediment to complete relief to be removed before complete relief can be had, then equity takes jurisdiction. *Beloit v. Morgan*, 7 Wall. 619, 17 L. ed. 205.

To illustrate: If you are suing to recover land upon a legal title, your action is at law, but if your remedy goes beyond a mere writ of possession in order to obtain complete enjoyment of the land, then jurisdiction is in equity.

Courts of equity have been very complacent and indulgent to themselves in cases of doubt. It is said, however, that equity courts must find some sensible ground for taking jurisdiction, and in the first mentioned case the court adopted the words "probable cause" to express the basis for assuming jurisdiction in equity. *Waite v. O'Neil*, 72 Fed. 353; *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682. I think it can be fairly stated that jurisdiction in equity will be taken unless by doing so there is a violent invasion of the jurisdiction of the court of law. *Ibid.*; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 10, 21 Mor. Min. Rep. 633; *Acord v. Western Pocahontas Corp.* 156 Fed. 997; *Rumbarger v. Yokum*, 174 Fed. 55. Or, to state it in another form: When the suit is for a simple recovery of money, without complications of any character, or for the recovery of specific real and personal property, without other process than a writ of possession, the jurisdiction is at law; all else falls within the jurisdiction of equity. *Scott v. Neely*, 140 U. S. 110, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Whitehead v. Shattuck*, 138 U. S. 152, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

To refuse jurisdiction there must be no symptom of equity or equitable pretense, delusive or otherwise. *Waite v. O'Neil*, 72 Fed. 354; *Clark v. Wooster*, 119 U. S. 326, 30 L. ed. 393, 7 Sup. Ct. Rep. 217.

It will be found that bills in equity that have been dismissed because of an adequate remedy at law embrace either a suit for a simple debt, or the recovery of a specific real or personal property without other complications. *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Scott v. Neely*, *supra*; *Hipp v. Babin*, 19 How. 278, 15 L. ed. 635; *Lewis v. Cocks*, 23 Wall. 470, 471, 23 L. ed. 71; *Hayward v. Andrews*, 106 U. S. 675, 27 L. ed. 272, 1 Sup. Ct. Rep. 544; *Gaines v. Miller*, 111 U. S. 398, 28 L. ed. 467, 4 Sup. Ct. Rep. 426; *Indian Land & T. Co. v. Schoenfelt*, 68 C. C. A. 196, 135 Fed. 485, 486. For reference I will give some of the

cases showing various conditions under which the rule has been applied, and in which it was held that the remedy at law was adequate and the bill dismissed. *Thompson v. Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765; *Scott v. Neely*, 140 U. S. 110, 111, 35 L. ed. 360, 361, 11 Sup. Ct. Rep. 712; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Buzard v. Houston*, 119 U. S. 351, 30 L. ed. 452, 7 Sup. Ct. Rep. 249; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232; *Hurt v. Hollingsworth*, 100 U. S. 103, 104, 25 L. ed. 570, 571; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Whitehead v. Entwistle*, 27 Fed. 778; *Lanier v. Alison*, 31 Fed. 100; *Morse Arms Mfg. Co. v. Winchester Repeating Arms Co.* 33 Fed. 184; *Mills v. Knapp*, 39 Fed. 595; *Jaffrey v. Bear*, 42 Fed. 569; *Walker v. Brown*, 58 Fed. 23; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 801; *Walker v. Brown*, 11 C. C. A. 135, 27 U. S. App. 291, 63 Fed. 205; *Strang v. Richmond, P. & C. R. Co.* 93 Fed. 72-75; *Alger v. Anderson*, 92 Fed. 699, 709, 712; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 517; *Sewerage & Water Board v. Howard*, 99 C. C. A. 177, 175 Fed. 555; *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; *United States v. Bitter Root Development Co.* 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318, S. C. 66 C. C. A. 652, 133 Fed. 274; *Ambler v. Choteau*, 107 U. S. 586-591, 27 L. ed. 322-324, 1 Sup. Ct. Rep. 556; *McKinley v. Lloyd*, 128 Fed. 519; *Powell v. Louisville*, 73 C. C. A. 276, 141 Fed. 960; *Farwell v. Colonial Trust Co.* 78 C. C. A. 22, 147 Fed. 480; *Griesa v. Mutual L. Ins. Co.* 94 C. C. A. 635, 169 Fed. 509; *Pacific States Supply Co. v. San Francisco*, 171 Fed. 727; *Buchanan v. Adkins*, 99 C. C. A. 246, 175 Fed. 692; *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

CHAPTER V.

WHEN A COURT OF EQUITY WILL ENFORCE A PURELY LEGAL REMEDY.

There is no question that a legal right will be enforced if the remedy sought be equitable (*Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 839, 840); that is to say, if some equitable relief is necessary to sustain or support the legal right, such as specific performance, rescission, reformation, or injunction, equity will take jurisdiction and give both legal and equitable relief; but there are conditions under which a court of equity will give a purely legal remedy. The rule may be stated as follows: When a court of equity has rightfully obtained jurisdiction, it will retain it for complete relief though it be purely legal, as—

First. When jurisdiction is taken upon an alleged equity which ceases before the suit ends, or is dissipated by the evidence on the trial of the cause, the court will administer the legal remedy. However, this rule is dependent upon the utmost good faith in setting up the equitable phase through which the jurisdiction is sought.

Under the old rule if it should appear that the complainant had no reasonable ground upon which to base the equity the court should dismiss the bill, but by new rule 22 if the equitable ground is not good the court is required to transfer the case to the law side, if the case is such that it should have been brought as an action at law; and requiring the plaintiff to make such alterations in the pleading as shall be essential. *Cubbins v. Mississippi River Commission*, 204 Fed. 308; *Goldschmidt Thermit Co. v. Primos Chemical Co.* 216 Fed. 382, 225 Fed. 769; *Collins v. Bradley*, 227 Fed. 199.

By act of Congress of March 3d, 1915, it is provided that if in any case brought in the Federal courts it should appear that a suit in equity should have been brought at law or suit at

law should have been brought on the equity side, the court shall order amendments to conform them to the proper practice. Any party at any stage of the proceedings may obviate by amendment any objection that his suit is brought on the wrong side of the court. The court shall proceed with the cause as amended, and all evidence taken in the case is admissible. (See Dismissal by Court, p. 548.) See *Waldo v. Wilson*, — C. C. A. —, 231 Fed. 654.

In *Clark v. Wooster*, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 217, it is said that if the case was one for equitable relief the mere fact that the ground for such relief expired, etc., would not take away the jurisdiction and preclude the court from granting the relief belonging to the case as made. *Griswold v. Hilton*, 87 Fed. 257; *Waite v. O'Neil*, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408, 72 Fed. 348; *Kirk v. DuBois*, 28 Fed. 460; *Shainwald v. Lewis*, 69 Fed. 492; *Hohorst v. Howard*, 37 Fed. 97; *Chambers v. Cannon*, 62 Tex. 293, 294.

The rule of the text-books is that courts of equity should not entertain jurisdiction of bills where damages or compensation in money, which are purely legal remedies, are sought, except when they are purely incidents to equitable relief; and when damages are so sought and there is no ground for the equitable relief demanded, the bill should be transferred under new rule 22.

Again, where there are no liens or trusts involved, or the equitable features are not apparent, equity should decline jurisdiction. *Dowell v. Mitchell*, 105 U. S. 432, 26 L. ed. 1143; *Dakin v. Union P. R. Co.* 5 Fed. 665; *Beers v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 273, 141 Fed. 959. The case of *Alger v. Anderson*, 92 Fed. 697-714, reviews the English and American cases, and sustains the rule as above stated. *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Dowell v. Mitchell*, 105 U. S. 430, 26 L. ed. 1142; *Germain v. Wilgus*, 14 C. C. A. 561, 29 U. S. App. 564, 67 Fed. 600; *Corbin v. Taussig*, 137 Fed. 153; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 515; *India Rubber Co. v. Consolidated Rubber Tire Co.* 117 Fed. 355; *Clark v. Wooster*, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; *Cherokee Nation v. Southern Kansas R. Co.* 33 Fed. 915; *Killian v. Ebbinghaus*, 110 U. S. 574, 28 L. ed. 248, 4 Sup. Ct. Rep. 232; *Buzard v.*

Houston, 119 U. S. 351, 30 L. ed. 452, 7 Sup. Ct. Rep. 249; Whitehead v. Shattuck, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; United States v. Bitter Root Development Co. 133 Fed. 274. (See reference cases cited at the end of chapter 4.) But should send the case to the law side under rule 22. This may be after the case proceeds (*Destructor Co. v. Atlanta*, 219 Fed. 1001), but in most of the cases cited, the equity set up was a pretext. *Ibid.*; *Burdell v. Comstock*, 15 Fed. 395; *Powell v. Louisville*, 73 C. C. A. 276, 141 Fed. 961, 962; *Truman v. Holmes*, 31 C. C. A. 215, 56 U. S. App. 739, 87 Fed. 743, 744; *Lewis v. Cocks*, 23 Wall. 469, 23 L. ed. 70; *McDonald v. Miller*, 84 Fed. 345; *Thompson v. Central Ohio R. Co.* 6 Wall. 136, 18 L. ed. 767; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Waite v. O'Neil*, 72 Fed. 355. These cases do not militate against the rule, that if jurisdiction existed when the bill was filed the mere fact that the equity was dissipated during the trial would not exclude incidental relief, though it be entirely legal. *Hohorst v. Howard*, *supra*; *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; *Waite v. O'Neil*, *supra*; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 10, 21 Mor. Min. Rep. 633; *Acord v. Western Pocahontas Corp.* 156 Fed. 997.

Under new rule 23 it is provided that where a matter ordinarily determinable at law arises in a suit in equity, such matter shall be determinable in that suit according to the principles applicable, without sending the case or question to the law side. *Goldschmidt Thermit Co. v. Primos Chemical Co.* 216 Fed. 382; *American Car & Foundry Co. v. Merchants' Despatch Transp. Co.* 216 Fed. 911; *Goldschmidt Thermit Co. v. Primos Chemical Co.* 225 Fed. 769; *Wright v. Barnard*, 233 Fed. 329. But the legal relief sought, for instance, as damages, should be connected with or grow out of the alleged equity set up as the ground of jurisdiction in equity. There is nothing in this rule preventing the court from sending a fact in issue to a jury incident to the main question. *Vosburg Co. v. Watts*, 137 C. C. A. 272, 221 Fed. 403; *Metcalf v. American School Furniture Co.* 108 Fed. 911; *Du Pont v. Abel*, 81 Fed. 535. See *Linden Invest. Co. v. Honstain Bros. Co.* 221 Fed. 178.

Second. When a suit in equity is necessary to settle a matter in issue between parties, the court will administer complete

relief, though, as to some matters involved, adequate relief may have been afforded by an action at law. *Krohn v. Williamson*, 62 Fed. 877; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 263, 102 Fed. 19; *Williamson v. Monroe*, 101 Fed. 322; *Re Leeds Woolen Mills*, 129 Fed. 926. Equity rule 21.

Third. A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal rights and to confer purely legal relief. The formula has been stated as follows: "An adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief." *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 227, 21 L. ed. 44; *Mutual L. Ins. Co. v. Blair*, 130 Fed. 971; *Mills v. Chicago*, 127 Fed. 735; *Smith v. Bivens*, 56 Fed. 353; *Sanford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546-548; *Preteca v. Maxwell Land Grant Co.* 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 676; *Dinsmore v. Southern Exp. Co.* 92 Fed. 714; *Bausman v. Denny*, 73 Fed. 70; *Grand Trunk Western R. Co. v. Chicago & E. I. R. Co.* 73 C. C. A. 43, 141 Fed. 795; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 468; *Tift v. Southern R. Co.* 123 Fed. 790-795; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 695; *Ozark-Bell Teleph. Co. v. Springfield*, 140 Fed. 666; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 553.

Where numerous persons have a community of interest, or a common right or title in the subject-matter in controversy, against a common adversary, involving the same questions of law and fact, equity will take jurisdiction. *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co.* 57 Fed. 45; *Ulman v. Jaeger*, 67 Fed. 980-983; *Sang Lung v. Jackson*, 85 Fed. 502; *Osborne v. Wisconsin C. R. Co.* 43 Fed. 824.

Again, wherever there is a common point of interest between the complainant and several defendants separately liable, the remedy at law is not as efficient as in equity (*Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257-264 and authorities cited); but, as said in the last case, "there is no hard and fast rule by which jurisdiction in equity, on the ground of avoiding a multiplicity of suits, can be determined;" and as said in *Hale v. Anderson*, 188 U. S. 77, 47 L. ed. 392, 23 Sup. Ct.

Rep. 244, "Each case, if not brought directly within the principle of some preceding case, must be decided upon the substantial convenience of all parties, etc." *Wyman v. Bowman*, supra. In *Hosmer v. Wyoming R. & I. Co.* 65 C. C. A. 81, 129 Fed. 888, the same rule is substantially stated, and it is added that, "it often becomes a nice question whether the convenience of the complainant outweighs the inconvenience of the defendants arising from the joinder of two or more causes of action in a single suit, and whether the relation between the causes of action is sufficiently apparent to present a common point of controversy" (see authorities cited in this case). See *Buchanan Co. v. Adkins*, 99 C. C. A. 246, 175 Fed. 791; *Hyman v. Wheeler*, 33 Fed. 630; *De Forest v. Thompson*, 40 Fed. 375; *Scruggs & Echols v. American Cent. Ins. Co.* 36 L.R.A.(N.S.) 92, 100 C. C. A. 142, 176 Fed. 224.

Again, the complainant to invoke the jurisdiction must be the party threatened and not the fact that the defendant may be subjected to a multitude of suits. *Thomas v. Council Bluffs Canning Co.* 34 C. C. A. 428, 92 Fed. 422; *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 97 C. C. A. 400, 173 Fed. 892. See *Headrick v. Larson*, 81 C. C. A. 378, 152 Fed. 93.

Again, it is said in *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 286, 53 L. ed. 800, 29 Sup. Ct. Rep. 426, that "where the multitude of suits to be feared consists in repetitions of suits by the same person against the complainant for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground, unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of parties." It is suggested, further, that it might be necessary to await the final decision of one suit at law, citing *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720, and *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434.

CHAPTER VI.

WHEN SECTION 723 MUST BE SET UP AS A DEFENSE TO BE EFFECTIVE.

This section, though mandatory in form, was intended to preserve the right of trial by jury, which may be waived. It has never been treated by the Federal courts as a fundamental principle of jurisdiction; that is, it has not been placed in the same plane with such tests of jurisdiction as "diversity of citizenship" (*Waite v. O'Neil*, 72 Fed. 351), but has been treated as directory, and as a matter of simple abatement subject to waiver. *Green v. Turner*, 98 Fed. 760. The courts uniformly hold that when set up as a defense it must be pleaded at the first opportunity; and there is no question that where a bill presents a case in which it is competent for a court of equity to grant relief, and it has jurisdiction of the subject-matter, an objection to jurisdiction under section 723 must be pleaded *in limine*, and must be set up by motion to dismiss or in the answer, as new rule 29 abolishes pleas and demurrers, and requires that objections to the bill of this character must be set up as above stated, which motion may be called up and disposed of before final hearing, at the discretion of the court. The rule further provides that in the event the defense is set up, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* may be taken. *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 295. See *Re Jones*, 209 Fed. 718; *Bogert v. Southern P. Co.* 211 Fed. 776. This rule disposes of the old 31 to 38 inclusive. *Sydney v. Mugford Printing & Engraving Co.* 214 Fed. 843. See *Wright v. Barnard*, 233 Fed. 329.

If the issue under section 723 is not raised by motion or answer, it will be considered waived. *Southern P. R. Co. v. United States*, 66 C. C. A. 581, 133 Fed. 651; *Hapgood v. Berry*, 85 C. C. A. 171, 157 Fed. 807-812; *Hawkeye Gold Dredging Co. v. State Bank*, 157 Fed. 253, 258; *Acord v. West-*

ern Pocahontas Corp. 156 Fed. 990; Quirk v. Quirk, 155 Fed. 199; McCloskey v. Pacific Coast Co. 22 L.R.A.(N.S.) 673, 87 C. C. A. 568, 160 Fed. 795-801; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; Brown & B. Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Sloss Iron & Steel Co. v. South Carolina & G. R. Co. 162 Fed. 542; Odberet v. Marquet, 99 C. C. A. 60, 175 Fed. 44; Dederick v. Fox, 56 Fed. 714-717; Reynolds v. Watkins, 9 C. C. A. 273, 22 U. S. App. 83, 60 Fed. 824; Western Electric Co. v. Reedy, 66 Fed. 164; Kilbourn v. Sunderland, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594. The above-cited cases sufficiently show that section 723 must be pleaded at the threshold of the case, or it is waived, when the subject-matter of the suit is of a class over which a court of equity has jurisdiction, or even if there be a doubt, and it is competent to grant the relief sought. *Ibid.*; Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674; Waite v. O'Neil, 72 Fed. 351-354; Tyler v. Savage, 143 U. S. 94, 36 L. ed. 88, 12 Sup. Ct. Rep. 340. In such cases, it is a personal privilege that may be waived. *Ibid.*; Warmath v. O'Daniel, 16 L.R.A. (N.S.) 414, 86 C. C. A. 277, 159 Fed. 87; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 322; Less v. English, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477; International Trust Co. v. Norwich Union F. Ins. Co. 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. 83.

The rule as above stated may be illustrated when suit is brought for specific performance. If the allegations are sufficient, a *prima facie* case of jurisdiction appears; but if, under the facts, the court may determine them insufficient to grant specific performance, unless an issue as to the jurisdiction has been raised *in limine*, the court will retain the bill under the prayer for general relief, and give judgment for the damages asked. Waite v. O'Neil, 72 Fed. 354; Mobile County v. Kimball, 102 U. S. 707, 26 L. ed. 243. When construed to be a personal privilege it comes too late after answer filed or after appeal. Highland Boy Gold Min. Co. v. Strickley, 54 C. C. A. 186, 116 Fed. 854, 855; Preteca v. Maxwell Land Grant Co. *supra*; Waite v. O'Neil, 72 Fed. 355; Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 157. However, it is not the invariable rule that if not set up *in limine* the court

will not dismiss, for, as said in *Reynolds v. Watkins*, 9 C. C. A. 273, 22 U. S. App. 83, 60 Fed. 825, neither consent nor negligence can give a court jurisdiction when there is no reasonable doubt that the bill brings into court matters that are cognizable in a court of law alone. *Ibid.* The true rule is that where the plaintiff, upon the face of the bill, shows he has a complete, "adequate remedy at law, and no other equitable relief is prayed for, it is not necessary that the objection be taken *in limine*, but may be made at any stage of the case, or the court may raise the objection *sua sponte*, which is the clear duty of the court." *Southern P. R. Co. v. United States*, 66 C. C. A. 581, 133 Fed. 655 and authorities cited; *Lewis v. Cocks*, 23 Wall. 470, 471, 23 L. ed. 71; *Allen v. Pullman Palace Car Co.* 139 U. S. 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 682; *Mills v. Knapp*, 39 Fed. 595. Where, then, there is an entire absence of any equitable phase, either in the case made or relief sought, the provisions of section 723 become jurisdictional, to be set up, as said, at any stage of the proceeding down to the final hearing on appeal. *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 227, 228, 21 L. ed. 44; *Kane v. Luckman*, 131 Fed. 621 and authorities cited. *Marthinson v. King*, 82 C. C. A. 360, 150 Fed. 49; *Tyler v. Savage*, 143 U. S. 97, 36 L. ed. 89, 12 Sup. Ct. Rep. 340; *Thompson v. Central Ohio R. Co.* 6 Wall. 136, 18 L. ed. 767; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Curry v. McCauley*, 11 Fed. 370; *Dowell v. Mitchell*, 105 U. S. 432, 26 L. ed. 1143; *Kramer v. Cohn*, 119 U. S. 357, 30 L. ed. 440, 7 Sup. Ct. Rep. 277; *Sullivan v. Portland & K. R. Co.* 94 U. S. 811, 24 L. ed. 326; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 536, 33 L. ed. 1025, 10 Sup. Ct. Rep. 604.

This brings us to discuss—

When the Court Will Act, Though Not Set Up as a Defense.

Having seen that the defense under section 723 is a privilege that may be waived if not pleaded *in limine*, and having intimated before that the failure to file such defense does not always have the effect of holding jurisdiction in equity, I will now state under what conditions a court of equity will entertain the objection to its jurisdiction, under section 723, by simple suggestion, or *sua sponte*.

If the bill on its face is clearly obnoxious to the provisions of section 723, then, whether pleaded or not, the court should dispose of the bill as required under rule 22 as above set forth, and where the bill goes to proof and there is an entire absence of evidence showing any reasonable ground upon which plaintiff could have expected relief in equity, the court should conform to the provisions of rule 22 in disposing of the case. *Cubbins v. Mississippi River Commission*, 204 Fed. 308; *Goldschmidt Thermit Co. v. Primos Chemical Co.* 216 Fed. 282; *Same Case*, 225 Fed. 772; *Corsicana Nat. Bank v. Johnson*, 134 C. C. A. 510, 218 Fed. 822. The court of equity is without jurisdiction and a right of trial by jury can be demanded by the parties. See equity rule 23. U. S. Rev. Stat. sec. 723; *Linden Invest. Co. v. Honstain Bros. Co.* 136 C. C. A. 121, 221 Fed. 179; *Re Empire Shipbuilding Co.* 136 C. C. A. 633, 221 Fed. 223.

But if a court of equity on examination of the proofs can find no reasonable grounds for its jurisdiction either in law or equity, the court should on its own motion dismiss the case; but, on the other hand, if the subject-matter of the suit, or the relief sought, belongs to a class of which a court of equity might take jurisdiction, or equitable relief can be granted to complete the remedy, though there may be some doubt, then you must set up the defense by answer *in limine*. (Authorities above.) *Erskine v. Forrest Oil Co.* 80 Fed. 586, 18 Mor. Min. Rep. 297; *Alger v. Anderson*, 92 Fed. 697; *Kansas City Southern R. Co. v. Quigley*, 181 Fed. 190. New rules 22-29.

From this discussion of section 723, you will observe, as said in *Waite v. O'Neil*, 72 Fed. 355, that, notwithstanding its mandatory feature, "jurisdiction is never declined by courts of equity, unless there was a stripping to the bone of pure legal cognizance, and of every delusive pretense of equitable cognizance relied on in the particular case; and wherever this process did not expose in the bone a case of pure and untinged legal jurisdiction, the equitable power to deal with it was maintained, whether the objection be made *in limine* or not." Occasionally the courts have sought to emphasize the importance of section 723 as a measure intended to preserve the right of trial by jury, but they have only been eddies in the great tide of decisions which establish jurisdiction upon the suspicion of an equity.

How Defense to Be Made and How Presented.

By new rule 29, as we have seen (1st) all defenses in point of law arising on the face of the bill, which heretofore was made by demurrer, or plea, shall be made by motion to dismiss, or in the answer. (2d) Every defense heretofore presentable by plea in bar or abatement shall be made in the answer, and may be separately heard and disposed of before the trial of the principal case, in the discretion of the court. If the bill then presents a naked legal claim the objection must be made by motion to dismiss, or in the answer under rule 29; but rule 22 requires the case to be transferred to the law side. *Goldschmidt Thermit Co. v. Primos Chemical Co.* 216 Fed. 382. If the objection does not appear on the face of the bill, then the issue should be raised in the answer, which may be heard as stated in the 2d clause of new rule 29.

Where the objection may be taken at any stage of the proceeding, as above set forth, as, where the evidence shows that complainant, notwithstanding his allegations, could not reasonably have expected equitable relief, it may be taken in any manner directing the court's attention to it.

By act of Congress March 3d, 1915, it is provided that any party to a suit may obviate the objection that his suit was not brought on the right side of the court, by amending his pleadings, and the cause shall be determined on the amended pleadings. (See Dismissal by Court, p. 548.)

Technical Forms Disregarded.

By new rule 18 technical forms of pleadings in Equity are abolished. *Zenith Carburetur Co. v. Stromberg Motor Devices Co.* 205 Fed. 158; *Williams v. Pope*, 215 Fed. 1000; *Sheeler v. Alexander*, 211 Fed. 544.

CHAPTER VII.

COURTS CREATED BY THE CONSTITUTION AND CONGRESS AND THEIR JURISDICTION.

Having determined that you have not a plain, adequate remedy at law, and your right to relief is not obnoxious to any of the requirements embodied in the maxims of equity, the next step would be to determine who are to be the parties to your bill; but inasmuch as it is peculiar to Federal courts that certain situations as to residence or citizenship may prevent any procedure in these courts against persons who may be proper, necessary, or indispensable parties to your suit; and inasmuch as the jurisdiction of Federal courts is dependent upon other statutory conditions and limitations which must appear in your pleadings, I will now proceed to discuss these conditions precedent to a suit in a Federal equity court, and in connection therewith to set forth as much of the Federal statute law affecting the jurisdiction of the court as is necessary to be understood to frame your pleadings so as to acquire the jurisdiction sought.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168; *Illinois C. R. Co. v. Adams*, 180 U. S. 528, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Ex parte Moran*, 75 C. C. A. 396, 144 Fed. 604; *Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 318; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 570. But in going into a Federal court there are two conditions to be considered, affecting your right:

First. Equitable as distinguished from legal.

Second. Federal as distinguished from State jurisdiction.

As to the first, a full discussion was presented to you in lectures upon "Equitable Jurisprudence," and referred to in a measure in discussing section 723 of U. S. Rev. Stat., so I will pass to the discussion of Federal as distinguished from State jurisdiction.

Article 3, section 1, of the Federal Constitution, vests the judicial power of the United States in one Supreme Court and such other inferior courts as Congress may from time to time ordain. It is thus seen that the Constitution provides only for one court, the Supreme Court, and fixes its original jurisdiction, and leaves to Congress unlimited power in ordaining and establishing all inferior courts and distributing within its discretion the judicial power indicated in section 2, article 3, among them.

Section 2 of this article extends the judicial power to all cases in law and equity arising under the Constitution and laws of the United States, and treaties made or which shall be made under their authority.

Second. To controversies between a State and citizens of another State.

Third. To controversies between citizens of different States.

Fourth. Between citizens of the same State claiming lands under grants from a different State. *Stevenson v. Fain*, 195 U. S. 168, 169, 49 L. ed. 143, 144, 25 Sup. Ct. Rep. 6.

Fifth. Between a State, or the citizens thereof, and foreign States, citizens, or subjects. *Pennsylvania v. Quicksilver Min. Co.* 10 Wall. 553, 19 L. ed. 998; *Alabama v. Burr*, 115 U. S. 413, 29 L. ed. 435, 6 Sup. Ct. Rep. 81; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

Sixth. Controversies in which the United States shall be a party. *United States ex rel. Maxwell v. Barrett*, 135 Fed. 193; *United States v. American Bell Teleph. Co.* 167 U. S. 225, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1086. See *United States use of Edward Hines Lumber Co. v. Henderlong*, 102 Fed. 2; *United States use of Salem-Bedford Stone Co. v. Sheridan*, 119 Fed. 236; *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715; *United States v. Churchyard*, 132 Fed. 82, 85; *United States v. Texas*, 143 U. S. 640, 36 L. ed. 291, 12 Sup. Ct. Rep. 488; *United States v. Michigan*, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

Seventh. Controversies between two or more States. *Virginia v. West Virginia*, 206 U. S. 290, 51 L. ed. 1068, 27 Sup.

Ct. 732; *Florida v. Georgia*, 11 How. 293, 13 L. ed. 702; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *New Jersey v. New York*, 3 Pet. 461, 7 L. ed. 741.

Eighth. To admiralty and maritime jurisdiction.

Ninth. To all cases affecting ambassadors, other public ministers, and consuls.

The 11th Amendment to the Constitution provides that the judicial power of the United States shall not be construed to extent to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State. *South Dakota v. North Carolina*, 192 U. S. 315, 48 L. ed. 459, 24 Sup. Ct. Rep. 269; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *New Hampshire v. Louisiana*, 108 U. S. 76-91, 27 L. ed. 656-662, 2 Sup. Ct. Rep. 176; *United States v. Lee*, 106 U. S. 204-206, 27 L. ed. 176, 177, 1 Sup. Ct. Rep. 240; *Hans v. Louisiana*, 134 U. S. 9-15, 33 L. ed. 845-847, 10 Sup. Ct. Rep. 504; *North Carolina v. Temple*, 134 U. S. 30, 33 L. ed. 852, 10 Sup. Ct. Rep. 509; *Fitts v. McGhee*, 172 U. S. 524, 43 L. ed. 539, 19 Sup. Ct. Rep. 269. The limits of the judicial power thus defined, it is left to Congress to prescribe how much of it is to be exercised by the inferior courts it creates. In this, Congress is supreme in discretion and power. *Lewis Pub. Co. v. Wyman*, 152 Fed. 202; *Sewing Mach. Co.'s Case* (*Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.*) 18 Wall. 553, 21 L. ed. 914; *United States v. Haynes*, 29 Fed. 691; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 521, 42 L. ed. 1130, 18 Sup. Ct. Rep. 685. The Constitution gives the capacity to take, and an act of Congress must have supplied it. *Nashville v. Cooper*, 6 Wall. 247-250, 18 L. ed. 851, 852. We must, then, look to the Constitution to see if Congress has acted within its limits in distributing the powers granted, and to the acts of Congress to determine what courts have been

created, and the extent of jurisdiction granted to each, remembering that the number, character, jurisdiction, and territorial limits of these inferior courts rests entirely in the discretion of Congress. *Anderson v. Bassman*, 140 Fed. 10; *United States v. Mar Ying Yuen*, 123 Fed. 159; *United States v. Haynes*, 29 Fed. 696; *United States v. Union P. R. Co.* 98 U. S. 605, 25 L. ed. 151; *Gaines v. Fuentes*, 92 U. S. 18, 23 L. ed. 527; *Sewing Mach. Co.'s Case (Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.)* 18 Wall. 577, 21 L. ed. 919; *Risley v. Utica*, 168 Fed. 744.

What Courts Were Created.

As said, the Constitution having created the Supreme Court and fixed its original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party (U. S. Rev. Stat. sec. 687; Const. art. 3, sec. 2. See also Rev. Stat. sec. 563, cl. 17, as to consuls; *Re Baiz*, 135 U. S. 417, 34 L. ed. 226, 10 Sup. Ct. Rep. 854; *Cooley v. Luco*, 76 Fed. 146; *Texas v. Lewis*, 14 Fed. 65; *Froment v. Duclos*, 30 Fed. 385; *Börs v. Preston*, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; *Washington v. Northern Securities Co.* 185 U. S. 255, 46 L. ed. 897, 22 Sup. Ct. Rep. 623; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Ames v. Kansas*, 111 U. S. 465, 28 L. ed. 489, 4 Sup. Ct. Rep. 437), and given to it appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make (art. 2, sec. 2, cl. 2), Congress can enlarge neither the one or the other, but it may determine how far within the limits of the capacity of the court to take, appellate jurisdiction shall be given and exercised by it. *California v. Southern P. Co.* 157 U. S. 261, 39 L. ed. 695, 15 Sup. Ct. Rep. 591; Const. art. 3, sec. 2; *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60; *Ex parte Yerger*, 8 Wall. 104, 19 L. ed. 338; *Daniels v. Chicago & R. I. R. Co.* 3 Wall. 254, 18 L. ed. 225; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 300, 32 L. ed. 246, 8 Sup. Ct. Rep. 1370.

See section 233 of New Code, chapter 10, Comp. Stat. 1913, sec. 1210, in substance as follows: The Supreme Court has exclusive jurisdiction where a State is a party, except between a State and its citizens or citizens of other States or aliens, in which latter cases it has original, but not exclusive, jurisdiction. See also New Code, chap. 11, sec. 256, clause 7, Comp. Stat. 1913, sec. 1233.

It has exclusive jurisdiction in suits against ambassadors or other public ministers or their domestics or servants; and original, but not exclusive, jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul or vice consul is a party. See also New Code, sec. 256, par. 8. Also chap. 2, New Code, sec. 24, pars. 2 to 25, Comp. Stat. 1913, secs. 991 (2)–991 (25).

The appellate jurisdiction is embodied in sections 236 and 237 of the New Code, Comp. Stat. 1913, secs. 1213, 1214. By sec. 234 of the New Code the Supreme Court may issue writs of prohibition in cases provided therein. By sec. 262 of the New Code, Comp. Stat. 1913, sec. 1239, it may issue all writs necessary to its jurisdiction.

Courts Established by Congress.

Congress, acting within its powers, in 1789 passed the first judiciary act, establishing circuit and district courts, defining their powers, or rather the jurisdiction of each. This original act was amended from time to time, and as amended will be found in title 13 of the Revised Statutes of the United States, which set forth the basis of the jurisdiction of the circuit courts until 1875, when the jurisdiction was vastly increased by giving to these courts jurisdiction over all cases when the matter in dispute arose under the Constitution and laws of the United States, or treaties made or which shall be made under their authority, and further increased it by providing for bringing in parties within the jurisdiction of the court who lived beyond the territorial limits or jurisdiction of the court in which the suit was pending, by personal or published service of its process. The jurisdictional act was again amended in 1887, and perfected in 1888, by which the jurisdiction was diminished by enlarging the amount of value of the subject-matter in dispute

from five hundred dollars, exclusive of costs, **as** in the act of 1875, to two thousand dollars, exclusive of interest and costs.

By act of March 3d, 1911, known as the "Judicial Code," which went into effect January 1st, 1912, and which abolished circuit courts and transferred its powers to the district courts of the United States (see Judicial Code, chap. 13, Appendix, secs. 289 to 294 inclusive, Comp. Stat. 1913, secs. 1266-1271) Congress sought to codify the various statutes and amendments affecting the jurisdiction of the courts of the United States, and repealing all acts in conflict (see chap. 14 New Code, sec. 297, Comp. Stat. 1913, sec. 1274). Appendix sec. 24 of the Code (Comp. Stat. sec. 991), prescribes as follows:

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects.

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if such assignment had been made: *Provided*, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the causes mentioned in the succeeding paragraphs of this section." These paragraphs are fully set forth, in which the jurisdiction of the district court is not affected by the sum or value of the subject-matter involved (see sec. 24, pars. 2 to 25, inclusive of the Judicial Code, Comp. Stat. 1913, secs. 991 (2)-991 (25), Appendix, chap. 2.

We see, then, the material change made by the new Code,

affecting jurisdiction is the abolishing of circuit courts, and increasing the amount or value involved from two to three thousand dollars exclusive of interest and costs.

A "Suit in Law or Equity" Defined.

The statute provides that the jurisdiction of the district court extends to all "suits in law or equity" of a civil nature. Suit applies to any proceeding in a court of justice by which one pursues that remedy that law or equity affords him. If a right is to be litigated, it is a suit. *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 702; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 63 C. C. A. 62, 128 Fed. 340; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Re Stutsman County*, 88 Fed. 337-340; *Gaines v. Fuentes*, 92 U. S. 20, 23 L. ed. 528; *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 140; *Elk Garden Co. v. T. W. Thayer Co.* 179 Fed. 558.

Jurisdiction of the District Court of the United States.

We then see that the original jurisdiction of the district court in suits of a civil nature, with the exception of the amount or value of the subject-matter involved, is the same as heretofore given to the circuit court under the jurisdictional and removal act of 1887-88, and may be stated as follows:

First. When a suit of a civil nature in law or equity arises under the Constitution and laws of the United States, or treaties made, or to be made, when the amount or value in dispute exceeds three thousand dollars, exclusive of interest and costs.

Second. When the controversy is between citizens of different States, and the amount or value in dispute exceeds three thousand dollars, exclusive of interest and costs.

Third. When the controversy is between citizens of a State and foreign State's citizens and subjects, and the amount or value in dispute exceeds three thousand dollars, exclusive of interest and costs.

Fourth. As between citizens of the same State claiming land under a grant from a different State.

Fifth. When the United States are plaintiffs, without refer-

ence to amount; or by any officer thereof authorized by law to sue. See *United States v. New York & O. S. S. Co.* 132 C. C. A. 305, 216 Fed. 63.

By sections 1 and 4, as above arranged, the jurisdiction is not dependent on citizenship, but the Federal courts take their jurisdiction from the *nature of the subject-matter*. The issues arising under these provisions are made *Federal questions*, which may be litigated in the United States courts between citizens of the same State.

By sections 2 and 3, as above arranged, the jurisdiction is based on diversity of citizenship; that is, all the parties plaintiff must be of a different citizenship from the parties defendant; or the citizens of a State on one side, and citizens or subjects of foreign States, *viz.*, aliens, on the other side.

It is thus seen that the jurisdiction of the district courts of the United States is a limited one, and the basis of their jurisdiction over property rights, with which alone equity deals, is limited either to diversity of citizenship or the existence of a Federal question, and where the amount or value involved is in excess of three thousand dollars, exclusive of interest and costs, except in cases where the United States are parties plaintiff (*Municipal Invest. Co. v. Gardiner*, 62 Fed. 955; *Byers v. McAuley*, 149 U. S. 618, 37 L. ed. 872, 13 Sup. Ct. Rep. 906), and within these limitations the United States courts determine for themselves the limits of their jurisdiction. *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 6. As to the power of Congress to confer judicial authority on the courts of States, see *Levin v. United States*, 63 C. C. A. 476, 128 Fed. 828-833, and authorities cited.

Courts of Equity Deal Only With Property Rights.

As said, within these limits, courts of equity deal only with property rights and the maintenance of obligations between citizens which affect them. *Taylor v. Kercheval*, 82 Fed. 497; *Re Sawyer*, 124 U. S. 210, 31 L. ed. 405, 8 Sup. Ct. Rep. 482. They will not deal with matters of an executive or political nature, nor do they interfere with the duties of any department of government, unless absolutely necessary to maintain and protect the rights of property (*Ibid.*); and in dealing with

property rights these limitations, as set forth, require the suit to be between citizens of different States, or citizens of a State and aliens, or the right must depend on a proper construction of the Constitution or laws of the United States, or treaties made by their authority; and in either case the amount or value of the subject matter in issue must exceed the sum of three thousand dollars, exclusive of interest and costs. In a word, the existence of one of these conditions with proper amount is fundamental, and *consent* cannot supply absence. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; *Re Winn*, 213 U. S. 459, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; *Thomas v. Ohio State University*, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24; *Henrie v. Henderson*, 76 C. C. A. 196, 145 Fed. 316; *Iowa Lillovet Gold Min. Co. v. Bliss*, 144 Fed. 446; *Anderson v. Bassman*, 140 Fed. 10; *Olds Wagon Works v. Benedict*, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 5; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520; *Byers v. McCauley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906. And the jurisdiction depends on the existence of these conditions at the beginning of the suit. *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 819; *Ritchie v. Burke*, 109 Fed. 19; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449.

Presumption of Jurisdiction.

The jurisdiction being limited, the presumption is against jurisdiction, unless it affirmatively appears (*Yeandle v. Pennsylvania R. Co.* 95 C. C. A. 282, 169 Fed. 941; *Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Garner v. Southern Mut. Bldg. & L. Asso.* 28 C. C. A. 381, 52 U. S. App. 344, 84 Fed. 3; *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 464, 50 U. S. App. 280, 85 Fed. 869; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Robertson v. Cease*, 97 U. S. 649,

24 L. ed. 1058; *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552), the rule being that courts created by statute can only have the jurisdiction given. *United States v. Southern P. R. Co.* 49 Fed. 300, and cases cited. However, a judgment is not subject to collateral attack, where jurisdiction has been exercised, though not apparent. *Evers v. Watson*, 156 U. S. 527-533, 39 L. ed. 520-522, 15 Sup. Ct. Rep. 430; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Of course, there are many acts of Congress giving special or exclusive jurisdiction to the Federal courts in such matters as concern the revenues of the United States, also bankrupt laws, interstate commerce, copyrights, patents, etc., which are not controlled by the general jurisdictional acts; therefore they do not fall within the purpose of these lectures, as I propose only to deal with the fundamental conditions required by the general acts governing the Federal courts of equity. *United States v. Standard Oil Co.* 152 Fed. 290-293; *Sunderland Bros. v. Chicago R. I. & P. R. Co.* 158 Fed. 877; *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 858; *Edmunds v. Illinois C. R. Co.* 80 Fed. 79; *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 981; *Re Horhorst*, 150 U. S. 653-661, 37 L. ed. 1211-1214, 14 Sup. Ct. Rep. 221; *Northern Securities Co. v. United States*, 193 U. S. 199, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Barnhard Bros. & Spindler v. Morrison*, — Tex. Civ. App. —, 87 S. W. 376, 377; *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770. In passing, I will call attention to the fact that, as said in *Camors-McConnell Co. v. McConnell*, 140 Fed. 414: "A contract may affect interstate commerce in a variety of ways," not direct, but merely incidental, when the rule of exclusive jurisdiction would not apply. *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. *Louisville & N. R. Co. v. Hughes*, 201 Fed. 727.

Again, it may be stated that where exclusive jurisdiction is granted to State courts by State legislation, it does not affect the jurisdiction of the Federal courts to deal with the same subject-matter and apply the remedies given by the State. *Barber*

Asphalt Paving Co. v. Morris, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945.

By § 256 of the new Judicial Code (Comp. Stat. 1913, § 1233 (Appendix) post, 882, the cases in which the jurisdiction of the United States district is declared to be exclusive of the jurisdiction of the State courts are specially stated.

See also sec. 24 of the new Judicial Code pars. 2 to 25 inclusive, Comp. Stat. 1913, secs. 991(2)–991(25).

CHAPTER VIII.

LIMITS OF TERRITORIAL JURISDICTION.

In chapter XV. I discuss in detail the territorial jurisdiction of the Federal courts, but in order to get a complete view of the jurisdictional act, it is necessary here to state that portion of it that defines the jurisdiction of the circuit courts with reference to their territorial limits, together with other existing statutes more or less affecting the provision.

Chap. 4, sec. 51 of the new Judicial Code (Comp. Stat. 1913, sec. 1033) provides that with the exception of such cases as are provided for in the five succeeding sections, no person shall be arrested in one district for trial in another in any civil action before a district court; and except as provided for in the six succeeding sections no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or defendant. See *Bogue v. Chicago, B. & Q. R. Co.* 193 Fed. 728.

Section 52 of the Judicial Code provides that when a State contains more than one Federal district, every suit not of a local nature against a single defendant must be brought in the district in which he resides, but if there are two or more defendants residing in different districts of the State, you may bring the suit in either, and a duplicate writ may be directed to the marshal of the other district for service.

Sec. 53, Judicial Code, provides that where a judicial district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division in which he resides; but if two or more defendants residing in different divisions it may be brought in either division.

Sec. 57 of the Judicial Code provides, that by consent of par-

ties and the order of the court, signed and filed in the case in vacation, or term time, the case may be transferred to any other division of the same district for trial without reference to the residence of the defendants.

Sec. 54 of the Judicial Code provides that in suits of a local nature, where defendant resides in different district in the State in which the suit is brought, process may issue against him, directed to the marshal of the district in which he resides. Sec. 55, Judicial Code, provides that in suits of a local nature at law or in equity, where the land or other subject-matter of a fixed character lies partly in one and partly in another district within the same State, you may sue in either district where the land lies. Sec. 8 of the act of 1875, which has been incorporated in the new Judicial Code as section 57, provides that where in any suit commenced in any district court of the United States to *enforce* any legal or equitable lien upon, or *claim to*, or remove any *encumbrance* or *lien* or *cloud* upon real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found in the district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur by a certain day to be designated by the court, which order shall be served on such absent defendant or defendants, if practical, wherever found, and also on the person or persons in possession, or in charge of said property, if any. Or when such personal service on the absent person or persons defendants cannot be had, or is not practicable, such order shall be published once a week for six consecutive weeks in such manner as the court directs. With this grouping of the statutes affecting the general and territorial jurisdiction of the circuit courts, and asking you to again remember that these courts have no jurisdiction other than given in these statutes,—they having no common law jurisdiction as incident to their creation by Congress,—I will proceed to discuss the several features of the act of 1888 essential to your right to go into a Federal court of equity, and which must appear upon the face of your bill, to wit:

First. Diversity of citizenship.

Second. A Federal question.

Third. Amount necessary to jurisdiction.

Fourth. Territorial jurisdiction.

S. Eq.—4.

In discussing these features of jurisdiction, you must keep in mind, as before said, that Federal courts possess no powers except such as the Constitution and statutes of Congress concur in conferring, and the presumption is against jurisdiction unless it affirmatively appears. *United States v. Southern P. R. Co.* 49 Fed. 297; *Re Barry*, 42 Fed. 113; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

CHAPTER IX.

DIVERSITY OF CITIZENSHIP.

The language of the act, as we have seen, provides substantially that when the matter in dispute exceeds in amount or value the sum of three thousand dollars, and the controversy is *between citizens of different States*, * * * and when suit is dependent on diversity of citizenship only, that it must be brought against the defendant in the district of the residence of plaintiff or defendant. (See appendix for act.) See *Bogue v. Chicago, B. & Q. R. Co.* 193 Fed. 731.

Citizenship, so far as the jurisdictional act is concerned, must be that kind that identifies itself with a particular state, and bona fide. *Marks v. Marks*, 75 Fed. 324; *Southern Realty Invest. Co. v. Walker*, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. Rep. 211; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Meyers v. Murray N. & Co.* 11 L.R.A. 216, 43 Fed. 698; *Morris v. Gilmer*, 129 U. S. 329, 32 L. ed. 695, 9 Sup. Ct. Rep. 289; *Kingman v. Holthaus*, 59 Fed. 316; *Mitchell v. United States*, 21 Wall. 352, 353, 22 L. ed. 587, 588; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935. *Harding v. Standard Oil Co.* 182 Fed. 421.

The 14th Amendment definition of citizenship does not affect the jurisdictional rule. *Nichols v. Nichols*, 92 Fed. 1, 2; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449. However, in *Clausen v. American Ice Co.* 144 Fed. 723, it is said that an allegation in a bill that plaintiff is a citizen of the United States and a resident of a certain State is sufficient under the 14th Amendment to the Constitution, the language of the Amendment being: "All persons born or naturalized in the United States and subject to the jurisdiction thereof." It is not affected by U. S. Rev. Stat. sec. 1992, Comp. Stat. 1913, sec. 3946, defining citizenship "as all persons born

in the United States and not subject to any foreign power, excluding Indians." This question will be fully discussed under "Issue of Citizenship and How Proved," so I pass on.

Diversity of citizenship as a basis of jurisdiction must appear in the statement of the bill in equity, setting forth parties and citizenship; and it must appear that every party on one side of the controversy is a citizen of a different State from every party on the other side. *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Wolfe v. Hartford Life & Annuity Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Wilson v. Oswego Twp.* 151 U. S. 63, 64, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; *Timmons v. Elyton Land Co.* 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Horne v. George H. Hammond Co.* 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 163; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Re Stutsman County*, 88 Fed. 337; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 628. And if there be two causes of action, diversity must appear in both. *King v. Inlander*, 133 Fed. 416. See *Howe & D. Co. v. Haugan*, 140 Fed. 184, 185.

Under the present act it matters not how numerous the parties may be; if there are parties from the same State on each side of the controversy, jurisdiction is lost, provided they be indispensable parties, as we shall hereafter see. *Gage v. Riverside Trust Co.* 156 Fed. 1007; *Tracy v. Morel*, 88 Fed. 801; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 368-386, 38 L. ed. 195-204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Anderson v. Bassman*, 140 Fed. 10, 11; *Peninsular Iron Co. v. Stone*, 121 U. S. 633, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; *Raphael v. Trask*, 118 Fed. 777; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 324; *Pittsburgh C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 712; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 163 and authorities cited. Even though a disclaimer be filed, if not dismissed. *Wetherby v. Stinson*, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 175, 176.

To illustrate: In *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 163, 37 L. ed. 1038, 14 Sup. Ct. Rep. 66, a corporation in Kentucky sued in the courts of Tennessee citizens of Tennessee, and joined a Kentucky corporation. Held, court had no jurisdiction, as the case presents citizens of the same State on both sides. The court further remarked that if the parties plaintiff and defendant are not citizens of different States, there is an entire want of jurisdiction, which cannot be waived by silence or otherwise. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

In *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 711, a Maryland and Ohio corporation sued an Ohio corporation in Ohio. The arrangement deprived the Federal court of Ohio of jurisdiction. *Central Trust Co. v. Virginia T. & C. Steel & I. Co.* 55 Fed. 774.

To show the changes that have been made, and for the better understanding of the decisions, I will state that under the act of 1789, chap. 20, sec. 11, the jurisdiction was only between a citizen of a State *where suit was brought* and citizens of other States. *Brooks v. Bailey*, 20 Blatchf. 85, 9 Fed. 438.

Under the act of 1875 it was decided that all that was necessary was a *diversity*, and not that either party must necessarily be a citizen of the State where suit was brought. *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 2 Fed. 830.

By sec. 51 of the Judicial Code (Comp. Stat. 1913, sec. 1033), where the jurisdiction is founded only on diversity of citizenship, the suit must be brought only in the district of the residence of the plaintiff or defendant.

This brings us to the rule that a citizen of one State cannot sue a citizen of another State in a third State. *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 602 and authorities cited; *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 271; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Shaw v. Quincy Min. Co.* supra; *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.* 108 Fed. 453; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep.

303. Except on foreclosure of land lying in the district. *Burke v. Mountain Timber Co.* 224 Fed. 591.

Thus, a corporation incorporated in one State, and having a usual place of business in another State, where sued, cannot be sued there by a citizen of a different State. *Shaw v. Quincy Min. Co.* supra.

Again, citizens of the same State cannot sue each other in the Federal courts of another State. *Wetherby v. Stinson*, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 173; *Excelsior Pebble Phosphate Co. v. Brown*, supra; *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 820; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* supra. However the right to raise the jurisdictional question is a privilege personal to the party being sued out of his State and cannot be made by codefendants. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *Jewett v. Bradford Sav. Bank & T. Co.* 45 Fed. 801; *Schiffer v. Anderson*, 76 C. C. A. 667, 146 Fed. 457; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 131, 35 L. ed. 661, 11 Sup. Ct. Rep. 982; *Smith v. Atchison, T. & S. F. R. Co.* 64 Fed. 1.

To illustrate: Citizens of Texas sued citizens of Alabama in Alabama, and joined Texas citizens as defendants; in this case the court struck out the Texas citizens. *Tug River Coal & Salt Co. v. Brigel*, supra.

As to the application of the rule to removals, see "Removals."

The foregoing cases clearly show that the test rule of jurisdiction based on diversity of citizenship is as follows: In arranging your parties to the bill, it must appear that each plaintiff is competent to sue, and each defendant liable to be sued, in the State and in *the Federal court* in which suit is brought. *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 628; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 324; *Blunt v. Southern R. Co.* 155 Fed. 500; *Anderson v. Bassman*, 140 Fed. 11; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 5; *Hooe v. Jamison*, 166 U. S. 397, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 174, 175, 20 L. ed. 180, 181; *Sweeney*

v. Carter Oil Co. 199 U. S. 257, 50 L. ed. 180, 26 Sup. Ct. Rep. 55; J. S. Appel Suit & Cloak Co. v. Baggott, 132 Fed. 1006.

This means that where there is more than one plaintiff, or more than one defendant, in *personal actions*, suit must be brought in the *State* and *district* in which all the plaintiffs were inhabitants, if brought in plaintiffs' residence district, or where all the defendants were inhabitants, if brought in defendants' residence district. Ames v. Holderbaum, 42 Fed. 342; Lancaster v. Asheville Street R. Co. 90 Fed. 129; Tice v. Hurley, 145 Fed. 391; Schultz v. Highland Gold Mines Co. 158 Fed. 341; McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; United States use of Brady v. O'Brien, 120 Fed. 448; Empire Min. Co. v. Propeller Tow-Boat Co. 108 Fed. 902; Jenkins v. York Cliffs Imp. Co. 110 Fed. 809; Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Interior Constr. Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 84 Fed. 76; St. Louis R. Co. v. Pacific R. Co. 52 Fed. 771, 772; Freeman v. American Surety Co. 116 Fed. 550. That is, parties from different States may sue a defendant or defendants where all the defendants reside in the same district, or parties plaintiff all residing in the same district may join several defendants, citizens of different States. Sweeney v. Carter Oil Co. 199 U. S. 252, 50 L. ed. 178, 26 Sup. Ct. Rep. 55; Turk v. Illinois C. R. Co. 134 C. C. A. 111, 218 Fed. 315.

In Smith v. Lyon, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303, a resident of St. Louis, Missouri, together with a citizen of Arkansas, sued in the eastern district of Missouri one O. T. Lyon, a citizen of Texas, in a personal action. The defendant moved to dismiss the case, because a citizen of Arkansas was improperly joined as plaintiff with a citizen of Missouri, and as between the Arkansas plaintiff and the Texas defendant the suit was not brought in the State or district of the residence of plaintiff or defendant. Ibid.; Empire Min. Co. v. Propeller Tow-Boat Co. *supra*. The court dismissed the case. While the suit showed different citizenship on both sides, and would have been well brought had the resident of St. Louis sued alone in his own district, yet the statute makes

no provision for two or more plaintiffs from different States suing a defendant in a third State, but it is required that the plaintiffs must be inhabitants of the same district to sue a defendant from another State in plaintiff's district. *Sewing Mach. Co.'s Case* (*Grover & B. Sewing-Mach. Co. v. Florence Sewing-Mach. Co.*) 18 Wall. 575, 21 L. ed. 918. See authorities above stated; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 174, 175, 20 L. ed. 180, 181; *Greeley v. Lowe*, 155 U. S. 68, 69, 39 L. ed. 73, 74, 15 Sup. Ct. Rep. 24; *Freeman v. American Surety Co.* *supra*. The rule is adhered to that each plaintiff must be competent to sue, and each defendant liable to be sued, in the court in which the suit is brought, and clearly a citizen of one State cannot sue a citizen of another State in the Federal court of a third State. *Empire Min. Co. v. Propeller Tow-Boat Co.* *supra*; and authorities above cited; *Consolidated Rubber Tire Co. v. Ferguson*, 106 C. C. A. 330, 183 Fed. 758.

We have, then, the rule that a citizen and nonresident cannot sue a nonresident in the citizen's district. *Smith v. Lyon*, 38 Fed. 53. Thus, a citizen of Texas and a citizen of Missouri cannot join in a suit in Texas against a citizen of Kansas. *Smith v. Lyon*, 38 Fed. 54; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 325; *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 Fed. 182; *Mirabile Corp. v. Purvis*, 143 Fed. 920; *Moffat v. Soley*, 2 Paine, 103, Fed. Cas. No. 9,688; *Lockhart v. Horn*, 1 Woods, 628, Fed. Cas. No. 8,445; *Searles v. Jacksonville, P. & M. R. Co.* 2 Woods, 621, Fed. Cas. No. 12,586; *Tuckerman v. Bigelow*, *Brunner*, Col. Cas. 631, Fed. Cas. No. 14,228; *Shute v. Davis*, Pet. C. C. 431, Fed. Cas. No. 12,828.

The rule in *Smith v. Lyon*, *supra*, presents a case where plaintiffs were improperly joined, but the rule is equally applicable to defendants. *Freeman v. American Surety Co.* *supra*; *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* 42 Fed. 81.

Thus citizens of Pennsylvania sued a corporation of West Virginia in the State and residence district of defendant, but joined a New York corporation as defendants. The court struck out the New York corporation, under the rule as stated.

Excelsior Pebble Phosphate Co. v. Brown, supra. The same rule was applied in *Ames v. Holderbaum*, 42 Fed. 341, where a citizen of Illinois sued a citizen of Iowa in Iowa, but joined as defendants citizens of Ohio.

This rule that each of the plaintiffs must be competent to sue, and each defendant liable to be sued, in the State and in the court in which suit is brought, does not apply to foreclosing liens (*Lancaster v. Asheville Street R. Co.* 90 Fed. 129, and authorities cited), nor in local actions as will appear hereafter, for this character of suit is controlled in the first instance by section 8 of the jurisdictional act of 1875, and in second instance by sections 740 and 741 of the Revised Statutes of the United States. The rule as stated above only applies to personal suits. *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; *Single v. Scott Paper Mfg. Co.* 55 Fed. 555; *Ames v. Holderbaum*, supra.

Word "Citizen" Used Collectively.

The foregoing cases show that the word "citizen," used in the statute, is used collectively, and means all citizens on one side of a suit; and the same construction is given to the word "inhabitant," as used in the act of 1888. *Greeley v. Lowe*, supra; *Smith v. Lyon*, 133 U. S. 318, 33 L. ed. 636, 10 Sup. Ct. Rep. 303; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 531.

Citizenship of Representative Parties.

In determining the diversity of citizenship, the citizenship of representatives of parties becomes material, and the general rule may be stated that, where the suit is brought in the name of one who acts in a representative capacity, such as executor, administrator, receiver, or trustee, it is the citizenship of the representative party that controls the jurisdiction, and not that of the beneficiary. *New Orleans v. Gaines* (*New Orleans v. Whitney*) 138 U. S. 606, 34 L. ed. 1106, 11 Sup. Ct. Rep. 428; *Bangs v. Loveridge*, 60 Fed. 965; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L.

ed. 179; *Knapp v. Troy & B. R. Co.* 20 Wall. 124, 22 L. ed. 331. (See authorities cited below.) Thus the citizenship of a trustee controls. *Hunter v. Robbins*, 117 Fed. 922; *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 32, 40, 41; *Knapp v. Troy & B. R. Co.* 20 Wall. 117, 22 L. ed. 328; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172-177, 20 L. ed. 179-181; *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 6; *Shirk v. La Fayette*, 52 Fed. 858; *Griswold v. Batcheller*, 75 Fed. 473. See *Smith v. Rackliffe*, 87 Fed. 968, as to citizenship of a receiver.

Exceptions to Rule.

However, there may be an exception to this rule where the trustee is a naked trustee, simply to hold the property, with no power over it and no right or duty to foreclose was given. *D. A. Tompkins v. Catawba Mills*, 82 Fed. 780-784. Where a trustee of a nonresident *cestui que trust* refuses to sue, the nonresident beneficiary may sue in the Federal court (*Bowdoin College v. Merritt*, 63 Fed. 213), unless the refusal was collusive. (*Detroit v. Dean*, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; *Cilley v. Patten*, 62 Fed. 500; See *Shipp v. Williams*, *supra*. See *Einstein v. Georgia S. & F. R. Co.* 120 Fed. 1009.) In *Einstein v. Georgia S. & F. R. Co.* 120 Fed. 1008, one of three trustees refusing to sue was made defendant; this trustee was a citizen of the State of the Corporation defendant; it was held the Federal court had jurisdiction, citing *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917. So, where the interest of the nonresident beneficiary is prosecuted in hostility to the trustees. *Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 38. Where the action relates only to the title or possession of the trust property, and the relation of the trustee to the beneficiary is not involved, the citizenship of the trustee controls; otherwise the citizenship of the *cestui que trust* may affect the jurisdiction. *Griswold v. Batcheller*, 75 Fed. 473; *Carey v. Brown*, 92 U. S. 172, 23 L. ed. 469; see *Stout v. Rigney*, 46 C. C. A. 459, 107 Fed. 545.

The citizenship of a guardian controls jurisdiction. *Pennington v. Smith*, 24 C. C. A. 145, 45 U. S. App. 409, 78 Fed. 409; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137

Fed. 48; See *Stout v. Rigney*, supra; *Mexican R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211.

So, also, the citizenship of administrators and executors. *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193; *McDuffie v. Montgomery*, 128 Fed. 107; *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484; *New Orleans v. Gaines* (*New Orleans v. Whitney*), 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; *De Forest v. Thompson*, 40 Fed. 375; *Harper v. Norfolk & W. R. Co.* 36 Fed. 103; *Bangs v. Loveridge*, 60 Fed. 963; *Bishop v. Boston & M. R. Co.* 117 Fed. 771; *Monmouth Invest. Co. v. Means*, 80 C. C. A. 527, 151 Fed. 160; *Wilson v. Hastings Lumber Co.* 103 Fed. 801. See *Schneider v. Eldredge*, 125 Fed. 640; *Rice v. Houston*, 13 Wall. 67, 20 L. ed. 484; *Bogue v. Chicago, B. & Q. R. Co.* 193 Fed. 729.

In bankruptcy, the citizenship of the bankrupt must control. *Mayer v. Cohrs*, 188 Fed. 443.

It may be stated generally that persons subrogated to the rights of others control jurisdiction by their own citizenship. Subrogation is not assignment. *New Orleans v. Gaines* (*New Orleans v. Whitney*), 138 U. S. 606, 34 L. ed. 1106, 11 Sup. Ct. Rep. 428.

By Next Friend.

A distinctive exception to the rule that the citizenship of the representative determines jurisdiction arises in suits in behalf of infants by next friend. In such cases the citizenship of the infant controls. *Blumenthal v. Craig*, 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320; *Woolridge v. M'Kenna*, 8 Fed. 668; *Voss v. Neineber*, 68 Fed. 947; *Dodd v. Ghiselin*, 27 Fed. 405; *Wiggins v. Bethune*, 29 Fed. 51. The domicile of the infant is that of its parents; if the father be living, that of the father; if dead, that of the mother. *Marks v. Marks*, 75 Fed. 325. Where the parents are divorced the domicile will be governed by the domicile of the parent to whom the infant has been awarded. *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 49.

For the Use of.

Another exception arises when suit is brought for the use of another; then the citizenship of the beneficiary controls.

CHAPTER X.

EFFECT OF CHANGE OF CITIZENSHIP PENDING SUIT.

It has already been stated that the jurisdiction is determined by the status of the parties when begun. The uniform rule has been that no change of residence after suit begun will affect the jurisdiction; and this rule applies to either party. *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *Brigel v. Tug River Coal & Salt Co.* 73 Fed. 13-17, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Ritchie v. Burke*, 109 Fed. 19; *Collins v. Ashland*, 112 Fed. 175; *Jarboe v. Templer*, 38 Fed. 217; *Cross v. Evans*, 29 C. C. A. 523, 52 U. S. App. 720, 86 Fed. 4, 5; *Louisville N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 566, 43 L. ed. 1088, 19 Sup. Ct. Rep. 817. Nor will any change by assignment of the cause of action, pending the suit, whereby the parties in interest become citizens of the same State; nor will any change of parties holding in a fiduciary capacity in any way affect the jurisdiction of the court once obtained. *Ibid.*; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; *Jarhoe v. Templer*, *supra*.

To illustrate: If you sue the tenant in possession and have thereby proper diversity, the bringing in of the landlord into the suit by the tenant will not affect jurisdiction, though the landlord be a citizen of the same State with the plaintiff. *Phelps v. Oaks*, 117 U. S. 239, 29 L. ed. 889, 6 Sup. Ct. Rep. 714; *Hardenbergh v. Ray*, 151 U. S. 118, 38 L. ed. 94, 14 Sup. Ct. Rep. 305; *Sioux City Terminal R. & Warehouse Co. v. Insurance Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Park v. New York, L. E. & W. R. Co.* 70 Fed. 641; *Stewart v. Dunham*, 115 U. S. 64, 29 L. ed. 330, 5 Sup.

Ct. Rep. 1163; *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 736.

But sometimes one changes his citizenship before suit in order to bring his case within Federal jurisdiction. It is now a fixed rule that this can be done if the change is bona fide, though the purpose may be to bring a suit in the Federal court. The change must be bona fide, that is, with the *animo manendi*, and not merely ostensible. *Mitchell v. United States*, 21 Wall. 352, 353, 22 L. ed. 587, 588. In *Jones v. League*, 18 How. 76, 15 L. ed. 263, plaintiff removed from Texas to Maryland, and brought suit against citizens of Texas in a Federal court in that State, the case was reversed because it appeared that the removal was not with the bona fide intent of becoming a permanent citizen of Maryland; and, again, it appeared that the deed to plaintiff by one Power was only colorable, as it was in pursuance of a scheme not to pass the title, but to give the plaintiff the right to sue in Texas for the benefit of Power, a citizen of Texas. *Marks v. Marks*, 75 Fed. 325. In *Kingman v. Holthaus*, 59 Fed. 316, where the plaintiff rented a room in an adjoining State, without changing his place of business or eating house, the suit was dismissed. *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 780, and authorities cited. *Simpson v. Phillipsdale Paper Mill Co.* 223 Fed. 661.

So again in *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289, it appearing that plaintiff removed to Tennessee to obtain jurisdiction in a Federal court in Alabama, and with no purpose to acquire a settled home, the case was dismissed, but on page 328 the court says: That a citizen of a State can change his citizenship to another, and sue in a Federal court, though his purpose in changing his domicile was to invoke Federal jurisdiction. If this new citizenship is really and truly acquired his right is a constitutional one. *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780; *Jones v. League*, 18 How. 81, 15 L. ed. 264; *Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289. In a word, the motive will not be considered if the change be real. *Wiemer v. Louisville Water Co.* 130 Fed. 244. The rule as above stated cannot be misunderstood, and, while the authorities are abundant, it is not deemed necessary to make further reference to them.

Transfer of Property to Create Diversity.

Federal cognizance of prospective litigation is often sought by transferring to a nonresident the subject of litigation or cause of action. To make such transfers effective for the purpose the same test as applied in change of citizenship is here applied,—that is, good faith in the transfer. The rule is that the transfer must be genuine, and bona fide, the title must in good faith pass to the nonresident. There must be no reservation of any right, title, or interest in the property transferred, nor must there be any secret purpose that after the litigation the property or any interest therein is to be restored to the resident grantee by repurchase or otherwise. As stated in change of citizenship, motive is not considered if the transfer be bona fide and without secret reservation.

In *Crawford v. Neal*, 144 U. S. 593, 36 L. ed. 556, 12 Sup. Ct. Rep. 759, it is said, if the transfer was fictitious to make the nonresident a nominal or colorable party, then there is no jurisdiction, but when all interest in the subject-matter is parted with upon good consideration, then the fact that the motive was to get Federal jurisdiction will not be considered. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 282; *Alkire Grocery Co. v. Richesin*, 91 Fed. 84; *Lake County v. Dudley*, 173 U. S. 251, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; *Irvine Co. v. Bond*, 74 Fed. 849; *Norton v. European & N. A. R. Co.* 32 Fed. 875; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 1; *Ashley v. Presque Isle County*, 27 C. C. A. 585, 54 U. S. App. 450, 83 Fed. 534; *Lake County v. Schradsky*, 38 C. C. A. 17, 97 Fed. 2; *Hayden v. Manning*, 106 U. S. 589, 27 L. ed. 307, 1 Sup. Ct. Rep. 617.

In *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67, it was held that the transfer of an overdue note and mortgage to get Federal jurisdiction was not collusive. A transfer made for the sole purpose of conferring jurisdiction is collusive. *Ibid.*; *Bernards Twp. v. Stebbins*, 109 U. S. 355, 27 L. ed. 961, 3 Sup. Ct. Rep. 252; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Marvin v. Ellis*, 9 Fed. 367; *Coffin v. Haggin*, 7 Sawy. 509, 11 Fed. 224.

Persons cannot by stratagem and device impose upon the jurisdiction of the Federal court, and when it appears from the evidence that the jurisdiction has been imposed upon, the court under the fifth section of the act of March, 1875, must dismiss the suit. *Ibid.*; *Fountain v. Angelica*, 20 Blatchf. 448, 12 Fed. 8; *Greenvalt v. Tucker*, 3 McCrary, 450, 10 Fed. 884; *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649.

Suit by Assignee.

Section 11 of the act of 1789, amended and somewhat changed by the act of 1888, limits the jurisdiction of the Federal courts in suits by assignees of promissory notes and other choses in action, which will be discussed hereafter.

See new Code, chap. 2, sec. 24, Comp. Stat. 1913, sec. 991.

Who Are Not Citizens Within the Meaning of the Act.

A State is not a citizen, therefore a State cannot sue in Federal courts on ground of diversity of citizenship, but it may sue where the basis of jurisdiction is a Federal question. *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 872; *Postal Teleg. Cable Co. v. United States* (Postal Teleg. Cable Co. v. Alabama), 155 U. S. 487, 39 L. ed. 232, 15 Sup. Ct. Rep. 192; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 353; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Oregon v. Three Sisters Irrig. Co.* 158 Fed. 349; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Minnesota v. Guaranty Trust & S. D. Co.* 73 Fed. 914. Nor has the Federal court jurisdiction when a State sues its own or citizens of another State. *Kentucky v. Chicago, I. & L. R. Co.* 123 Fed. 457. Where a State gives consent to its own citizens to sue it, the suit cannot be carried into the Federal court, though there be a Federal question; however, this would not prevent a writ of error to the Supreme Court of the United States if the decision of the court of last resort be against the right claimed by virtue of a Federal law. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; *Hans v. Louisi-*

ana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; North Carolina v. Temple, 134 U. S. 30, 33 L. ed. 852, 10 Sup. Ct. Rep. 509.

The citizens of the District of Columbia and the Territories are not citizens of States within the meaning of the Federal judiciary act. Maxwell v. Federal Gold & Copper Co. 83 C. C. A. 570, 155 Fed. 110; Watson v. Bonfils, 53 C. C. A. 535, 116 Fed. 157; McClelland v. McKane, 154 Fed. 164, 165; Weller v. Hanaur, 105 Fed. 193; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108, 36 Fed. 8; Johnson v. Bunker Hill & S. M. & C. Co. 46 Fed. 417; Hooe v. Jamieson, 166 U. S. 397, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596. See Koenigsburger v. Richmond Silver Min. Co. 158 U. S. 50, 39 L. ed. 892, 15 Sup. Ct. Rep. 751.

You cannot join a citizen of a State with a citizen of a Territory. Watson v. Bonfils, 53 C. C. A. 535, 116 Fed. 157. As to citizens of Porto Rico, see *Re Gonzalez*, 118 Fed. 941, s. c. 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177.

CHAPTER XI.

SHIFTING PARTIES TO CREATE DIVERSITY.

Having stated the general rules of jurisdiction dependent on diversity of citizenship, which should appear in a bill in equity, I will now speak of a condition of case when the circuit court will take jurisdiction, though a diversity of citizenship does not appear in the bill.

Prior to the act of 1875 the pleadings only were looked to to determine the diversity of citizenship, and the position of parties on the record was conclusive. *Bland v. Fleeman*, 29 Fed. 672.

Since the act of 1875 the courts will not, in order to retain jurisdiction on the ground of diversity of citizenship, be bound by the position of parties in the bill, but will shift them, if their interests will permit, and so arrange them as to fall within the rule of jurisdiction, that all parties plaintiff will be of a different citizenship from all parties defendant. *Stephens v. Smartt*, 172 Fed. 471, and authorities cited; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Steele v. Culver*, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; *Evers v. Watson*, 156 U. S. 532, 39 L. ed. 522, 15 Sup. Ct. Rep. 430; *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; *Anderson v. Watt*, 138 U. S. 701, 34 L. ed. 1080, 11 Sup. Ct. Rep. 449.

To this end, the court must determine; First, whether the parties from the same State on either side are indispensable; if not, it will dismiss them to create the necessary diversity. *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 694. Second, if they cannot thus be dismissed, then the court determines their relation to the subject-matter, and if their position can be shifted so as to create diversity and still protect their rights,

it will do so and take jurisdiction; if this cannot be done, the case must be dismissed. In determining their relation to the subject-matter, the court cannot divide indispensable parties having identical interests, as will be hereafter seen.

By shifting the parties is meant that parties defendant may be made parties plaintiff, which can often be done and their rights as well protected as if they had remained defendants. In the same way parties plaintiff may be shifted to the defendant side. That is, parties may be arranged according to their actual interest in the controversy, and the court retain jurisdiction. New Code, sec. 37, Comp. Stat. 1913, sec. 1019. *Cilley v. Patten*, 62 Fed. 498-500; *Oberlin College v. Blair*, 70 Fed. 417; *Blake v. McKim*, 103 U. S. 336, 26 L. ed. 563; *Harter Twp. v. Kernochan*, 103 U. S. 566, 567, 26 L. ed. 412, 413; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Claiborne v. Waddell*, 50 Fed. 368; *First Nat. Bank v. Radford Trust Co.* 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 573; *Consolidated Water Co. v. Babcock*, 76 Fed. 248; *Removal Cases*, supra; *Wood v. Deskins*, 72 C. C. A. 558, 141 Fed. 507; *Mann v. Gaddie*, 88 C. C. A. 1, 158 Fed. 43; *Sea Board Air Line R. Co. v. North Carolina R. Co.* 123 Fed. 631. This rule was first applied in construing the second section of the judiciary act of 1875, providing for removal of all suits of a civil nature from State to Federal courts in which there was a controversy between citizens of different States, it being held that for the purposes of removal the matter in dispute may be first ascertained, and the parties arranged with reference to the actual interest, on opposite sides of the dispute, and if in such arrangement it appears that those on one side are of a different citizenship from those on the other, the cause could be removed from the State to the Federal court. New Code, sec. 28. *Removal Cases* and *Consolidated Water Co. v. Babcock*, supra; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 531; *Evers v. Watson*, supra; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 709. Although this section, as will be seen by reference to the statute, related to removals from State to Federal courts, it was soon applied to suits originally brought in the circuit courts. *Ibid.*; *Pacific R. Co. v. Ketchum*, 101 U. S. 298, 25 L. ed.

936; Oberlin College v. Blair, *supra*; Ayres v. Wiswall, 112 U. S. 192, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; Dormitzer v. Illinois & St. L. Bridge Co. 6 Fed. 217; Covert v. Waldron, 33 Fed. 312; Shipp v. Williams, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 7. It is thus seen that the construction given to the statute removes the jurisdiction by diversity of citizenship from dependence on the arbitrary and capricious arrangement of the pleader, and while often it becomes necessary to join as defendants those who are unwilling to become plaintiffs, yet such arrangement does not bind the court, if it becomes necessary to change them, in order to remove a case to the Federal court, or retain jurisdiction when originally filed. Again, an improper joinder of parties that may defeat jurisdiction will not be permitted. Horn v. Lockhart, 17 Wall. 579, 21 L. ed. 660; Snow v. Smith, 88 Fed. 657; Mason v. Dullagham, 27 C. C. A. 296, 53 U. S. App. 539, 82 Fed. 689.

Identity of Interests.

It has been said that you cannot place on both sides of the controversy, in order to retain jurisdiction, indispensable parties having identity of interests. Johnson v. Ford, 109 Fed. 503; Manefee v. Frost, 123 Fed. 633; Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co. 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 705; Joseph Dry Goods Co. v. Hecht, 57 C. C. A. 64, 120 Fed. 761; Carroll v. Chesapeake & O. Coal Agency Co. 61 C. C. A. 49, 124 Fed. 309; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096; Mangels v. Donau Brewing Co. 53 Fed. 513; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420. If any of the parties plaintiff have the same interest with any of the parties defendant, and the interest is not separable, as will be hereafter explained, you cannot separate them because they are citizens of different States, in order to get jurisdiction by diversity. Thus a beneficiary, a citizen of one State, suing a mortgagor, who is a citizen of another State, in a Federal court in the former State to foreclose a trust deed or mortgage, naming a trustee who is a citizen of the latter State also, cannot make the trustee a party

defendant so as to have diversity, where there is no antagonism or no relief asked against the trustee, because, so far as the foreclosure is concerned, the interests of the beneficiary and trustee are identical. *Ibid.*; *Boston Safe Deposit & T. Co. v. Racine*, 97 Fed. 817; *Old Colony Trust Co. v. Atlanta R. Co.* 100 Fed. 798; *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; *Gage v. Riverside Trust Co.* 156 Fed. 1003; *Redfield v. Baltimore & O. R. Co.* 124 Fed. 929; *Allen-West Commission Co. v. Brashcar*, 176 Fed. 119-122, and authorities cited. See *Gaddie v. Mann*, 147 Fed. 966; *Casey v. Baker*, 212 Fed. 247. So, if the trustee and beneficiary be of the same State, and the trustee is made a party defendant with the mortgagor, who is a nonresident, the court will remove the cause and treat the trustee as plaintiff with the beneficiary. If a trustee is a citizen of a State other than the State in which the suit is brought, or, as said in *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 5, if he is qualified by his citizenship to sue in a Federal court, then the citizenship of the beneficiary under the trust is wholly unimportant. But if the trustee is disqualified by being a citizen of the same State with the defendants, a suit cannot be entertained, even though the beneficiary be a nonresident. The rule would not be changed by reason of the refusal of the trustee to act. 10 C. C. A. 248. *Gardner v. Brown*, 21 Wall. 36, 22 L. ed. 527; *Caylor v. Cooper*, 165 Fed. 758; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Redfield v. Baltimore & O. R. Co.* 124 Fed. 929; *Menefee v. Frost*, 123 Fed. 633; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 122 Fed. 922; *Rust v. Brittle Silver Co.* 7 C. C. A. 389, 19 U. S. App. 237, 58 Fed. 611. See *Bowdoin College v. Merritt*, 63 Fed. 213.

Again, the rule may be illustrated by cases where the interests of heirs are identical: You cannot, because of their diverse citizenship, place them on both sides of a suit in order to settle an administration of the estate. *Bland v. Fleeman*, 29 Fed. 671; *Cilley v. Patten*, 62 Fed. 500; *Oberlin College v. Blair*, 70 Fed. 414. So in partition, you cannot shift parties to obtain jurisdiction. *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 279; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726. Nor where there are two executors, one of whom

is a citizen of the same State with defendants. See *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

In *Smith v. Consumers' Cotton Oil Co.* 30 C. C. A. 103, 52 U. S. App. 603, 86 Fed. 359, it was held that you could dismiss as to one member of a firm from a State with plaintiff in order to retain jurisdiction. This was a suit in which a citizen of Illinois sued the members of a Texas firm, one of whom was a citizen of Illinois, on a breach of contract. The court permitted the Illinois member to be dismissed from the suit in order to retain jurisdiction. But in *Ruble v. Hyde*, 1 McCrary, 513, 3 Fed. 331, a partnership of Minnesota sued in Minnesota seven persons as copartners, one of whom was a citizen of Minnesota. The suit was in the State court; the cause was removed by the six nonresident defendants to the Federal court. On a motion to remand, the court granted it, because the Minnesota member of the firm was not a nominal party, and being a citizen of the same State with plaintiff, the court could not take jurisdiction. *Hyde v. Ruble*, 104 U. S. 407, 26 L. ed. 823. It will be seen that the case of *Ruble v. Hyde*, *supra*, was not referred to in *Smith v. Consumers' Cotton Oil Co.* It was evidently overlooked, or we should not have had a different conclusion upon similar facts, in determining so important a question of jurisdiction.

CHAPTER XII.

SEPARABLE CONTROVERSY.

As to what is a separable interest which may control the jurisdiction of the Federal courts, and by which diversity of citizenship may be created, is indicated in the latter clause of section 2 of the act of 1875, and amended in section 2 of the judiciary act of 1888, which is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove such suit into the circuit court of the United States." New Code, sec. 28 (Comp. Stat. 1913, sec. 1010), Appendix.

In the act of 1875 either the plaintiff or defendant could remove the case into the Federal court, but at present, under the act of 1888, only a nonresident defendant or defendants can remove the case from the State court. New Code, sec. 28.

This clause of section 2 has been frequently construed and applied to suits originally filed in the Federal courts, and the principle fixed, that if the interest of the party whose situation as to residence or citizenship would defeat jurisdiction; is a *separable* interest, and the matters involved in the bill can be wholly determined between the parties properly before the court, without materially affecting the party holding the separable interest, then the court will dismiss the party holding the separable interest and retain jurisdiction. *Geer v. Mathieson Alkali Works*, 190 U. S. 432, 47 L. ed. 1124, 23 Sup. Ct. Rep. 807; *Smedley v. Smedley*, 110 Fed. 258; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 455; *Stanbrough v. Cook*, 3 L.R.A. 400, 38 Fed. 372, 373; *Hyde v. Ruble*, 104 U. S. 409, 26 L. ed. 823; *Western U. Teleg. Co. v. Brown*, 32 Fed. 339; *Barney v. La-*

tham, 103 U. S. 205, 26 L. ed. 514; *Lomax v. Foster Lumber Co.* 99 C. C. A. 463, 174 Fed. 966.

But the question is, what is the test of this separable interest that will authorize a dismissal of a party to sustain diversity of citizenship? It must appear that a complete decree can be granted without the presence of the separate interest, and without injury to the party holding it, whose presence would affect the jurisdiction. *Ibid.*; *Ayres v. Wiswall*, 112 U. S. 192, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; *Torrence v. Shedd*, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 385, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Hanrick v. Hanrick*, 153 U. S. 196, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; *Bates v. Carpentier*, 98 Fed. 452; *Regis v. United Drug Co.* 180 Fed. 201. But it is not separable because parties are asking for separate decrees and executions, but what does the whole case show the controversy to be. See *MacGinnis v. Boston & M. Consol. Copper & S. Min. Co.* 55 C. C. A. 648, 119 Fed. 100, 101.

Thus, a case contains a separable controversy when the cause of action sued upon is capable of separation into two or more independent suits, one of which is wholly between citizens of different States; that is, can be fully determined between them without the presence of the other party obnoxious to the Federal jurisdiction. *Barth v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, 60 Fed. 468; *Stanbrough v. Cook*, *supra*; *Fraser v. Jennison*, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171; *Carothers v. McKinley Min. & Smelting Co.* 116 Fed. 951; *Western U. Teleg. Co. v. Brown*, 32 Fed. 341; *Barney v. Latham*, 103 U. S. 212-216, 26 L. ed. 517, 518; *Brown v. Trousdale*, 138 U. S. 396, 34 L. ed. 990, 11 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Farmer*, 23 C. C. A. 574, 36 U. S. App. 771, 77 Fed. 931. See *Veariel v. United Engineering & Foundry Co.* 197 Fed. 877.

The clear purpose of the clause in the act is to permit a non-resident citizen joined with other defendants in a State court, to remove the case to the Federal court, if as between him and the plaintiff the cause be separable; that is, the issues affecting him can be wholly determined without the presence of the other defendants. Again, it is applied when an original bill is

filed and a party to the bill, whose situation as to residence would defeat the jurisdiction, has a separable interest. In such case the court will dismiss the separable interest to retain jurisdiction. *Ibid.*

This rule is frequently illustrated in suits brought against many defendants to quiet title, where defendants hold under separate deeds (*Bates v. Carpentier*, 98 Fed. 454; *Stanbrough v. Cook*, 3 L.R.A. 400, 38 Fed. 369; *Bacon v. Felt*, 38 Fed. 870), but not under a joint deed, for in this latter case no decree could be rendered without affecting all parties in the deed, which is a test of the separable interest. *Peninsular Co. v. Stone*, 121 U. S. 632, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1010. It seems that there must be neither joint right or liability. *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. 257, 258.

Again, in determining whether there is a separable controversy, you must not be confused by the fact that various defendants may set up various and separate defenses against a single controversy. Such separate defenses, however different, do not constitute the separable interest that must exist as a basis to divide the controversy, and dismissing the party from the suit if joined or omitting him from the bill. *Ayres v. Wiswall*, 112 U. S. 193, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; *Connell v. Smiley*, 156 U. S. 340, 39 L. ed. 444, 15 Sup. Ct. Rep. 353; *Torrence v. Shedd*, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 97, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; *Dougherty v. Yazoo & M. Valley R. Co.* 58 C. C. A. 651, 122 Fed. 205; *Miller v. Clifford*, 5 L.R.A.(N.S.) 49, 67 C. C. A. 52, 133 Fed. 884, and authorities cited; *Colburn v. Hill*, 41 C. C. A. 467, 101 Fed. 505; *Rosenthal v. Coates*, 148 U. S. 142-147, 37 L. ed. 399, 400, 13 Sup. Ct. Rep. 576; *Re Jarnecke Ditch*, 69 Fed. 169; *Graves v. Corbin*, 132 U. S. 588, 33 L. ed. 468, 10 Sup. Ct. Rep. 196. See *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 756, 757. And this test of a separable interest is not affected in equity by State statutes permitting judgment to be taken against one or more of the defendants. *Louisville & N. R. Co. v. Ide*, 114 U. S. 52-57, 29 L. ed. 63-65, 5 Sup. Ct. Rep. 735.

To illustrate: A bill is filed to reach the property of a

partnership and to declare certain encumbrances void. We have in such case only a single controversy, though there are various defendants and various defenses (*Graves v. Corbin*, 132 U. S. 585, 33 L. ed. 467, 10 Sup. Ct. Rep. 196; *Torrence v. Shedd*, 144 U. S. 531, 36 L. ed. 531, 12 Sup. Ct. Rep. 726. See *Brooks v. Clark*, 119 U. S. 511, 30 L. ed. 485, 7 Sup. Ct. Rep. 301), or a creditors' bill to subject encumbered property; the controversy is single, though the defenses are different (*Fidelity Ins. Trust & S. D. Co. v. Huntington*, 117 U. S. 281, 29 L. ed. 899, 6 Sup. Ct. Rep. 733; *Rosenthal v. Coates*, 148 U. S. 147, 37 L. ed. 400, 13 Sup. Ct. Rep. 576; *Thurber v. Miller*, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 374; *Colburn v. Hill*, *supra*), for the plaintiff seeks a complete decree to subject the property to sale free from any encumbrance. *Ibid*.

So in trying title to a tract of land where residents and non-residents are made parties defendant, no separable controversy is presented so that a nonresident may remove the case. *Lomax v. Foster Lumber Co.* 99 C. C. A. 463, 174 Fed. 959-965. See *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 581-582. Condemnation proceedings. *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 171.

So an action by a citizen of one State against a citizen corporation of same State and nonresidents, to compel corporation to transfer stock, cannot be removed by nonresident on the ground of a severable cause of action. *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 62, 29 L. ed. 67, 5 Sup. Ct. Rep. 738.

So in suit to foreclose a mortgage, where mortgagor and mortgagee are residents of same State. *Thompson v. Dixon*, 28 Fed. 6.

So in a creditors' suit to set aside collusive judgments. *Graves v. Corbin*, 132 U. S. 589, 33 L. ed. 468, 10 Sup. Ct. Rep. 196.

So in suit seeking cancelation of bonds. *Wilson v. Oswegc Twp.* 151 U. S. 67, 38 L. ed. 75, 14 Sup. Ct. Rep. 259.

So in action for partition. *Torrence v. Shedd*, *supra*.

So in specific performance, where an agent negotiating the sale was a necessary party and of the same citizenship, with

complainant. *Scoutt v. Keck*, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 900.

These cases all illustrate the rule that where the bill discloses but a single cause of action, it is not separable. *McMillan v. Nowes*, 146 Fed. 926; *Reinartson v. Chicago G. W. R. Co.* 174 Fed. 707; *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 171.

Joint and Several Liability.

Where the liability of two or more is joint and several, and plaintiff elects to sue jointly, a separable interest of one of the defendants cannot be set up to obtain Federal jurisdiction. *Moore v. Los Angeles Iron & Steel Co.* 89 Fed. 78, and authorities cited; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Graves v. City & Suburban Teleg. Asso.* 132 Fed. 389; *Lathrop-Shea & H. Co. v. Pittsburg, S. & M. R. Co.* 135 Fed. 619; *Pirie v. Tvedt*, 115 U. S. 43, 29 L. ed. 332, 5 Sup. Ct. Rep. 1034, 1161; *Brown v. Cox Bros. & Co.* 75 Fed. 689; *Mutual Reserve Fund Life Asso. v. Farmer*, 23 C. C. A. 574, 36 U. S. App. 771, 77 Fed. 929; *Little v. Giles*, 118 U. S. 602, 30 L. ed. 271, 7 Sup. Ct. Rep. 32; *Sexton v. Seelye*, 39 Fed. 705; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 97, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; *Goode v. Colorado Springs*, 200 Fed. 99.

So in an action founded in tort, plaintiff may sue one or all the joint tort feasers, but when all are sued there can be no separable controversy with any one defendant so as to give a Federal court jurisdiction (*Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1; *Evans v. Felton*, 96 Fed. 176; *Carr v. Kansas City*, 87 Fed. 1; *Doremus v. Root*, 94 Fed. 760; *Graves v. City & Suburban Teleg. Asso.* 132 Fed. 387; *Keller v. Kansas City, St. L. & C. R. Co.* 135 Fed. 202; *Riser v. Southern R. Co.* 116 Fed. 216; *Fogarty v. Southern P. Co.* 123 Fed. 974, and authorities cited. See *Atlantic & P. R. Co. v. Laird*, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120; *Little v. Giles*, 118 U. S. 600, 30 L. ed. 270, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203), or where the bill is to cancel for fraud (*Oakes v. Yonah Land & Min. Co.* 89 Fed. 243); but in such cases there must be co-operation in fact, or community in wrong-

doing. *Mitchell v. Smale*, 140 U. S. 409, 35 L. ed. 443, 11 Sup. Ct. Rep. 819, 840.

Again, where a party sues to recover personal damage against two defendants, one being nonresident, there is no separable controversy, unless it be shown that the home party was joined to oust jurisdiction. *Graves v. City & Suburban Teleg. Asso.* supra. Thus a railroad company and conductor being joined, it being alleged that party was injured by negligence of the conductor to obey rules was held not to be separable. *Riser v. Southern R. Co.* 116 Fed. 215. See *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 139, 45 L. ed. 125, 21 Sup. Ct. Rep. 67; *Weaver v. Northern P. R. Co.* 125 Fed. 155; *Rupp v. Wheeling & L. E. R. Co.* 58 C. C. A. 161, 121 Fed. 825; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637; *Doremus v. Root*, 94 Fed. 760; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286; *Painter v. Chicago, B. & Q. R. Co.* 177 Fed. 517; *Stevenson v. Illinois C. R. Co.* 192 Fed. 956.

But in *Deere v. Chicago, M. & St. P. R. Co.* 85 Fed. 876, it is held that motive will not be considered if an interest exists.

Where, however, a statute imposes an obligation on a corporation alone, then it seems that if injury occurs by a breach of the duty thus required by the statute, there can be no joint liability between a corporation and an employee by failure of the company to perform the duty, and such action is separable. *Kelly v. Chicago & A. R. Co.* supra; *Bryce v. Southern R. Co.* 122 Fed. 709; *Williard v. Spartanburg, U. & C. R. Co.* 124 Fed. 801. See *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 87-96; *Jackson v. Chicago, R. I. & P. R. Co.* 102 C. C. A. 159, 175 Fed. 432-435. See *Fogarty v. Southern P. Co.* 123 Fed. 975, as to proper allegations; *Reinartson v. Chicago G. W. R. Co.* 174 Fed. 707.

In *Batey v. Nashville, C. & St. L. R. Co.* 95 Fed. 368, the railroad company and Pullman company were sued, alleging the injury to be caused by negligence in handling the train and against the other for negligence in construction of the berth by which he was thrown out. This was held separable.

While these cases founded upon tort and trespass are purely actions at law, yet they serve to illustrate the principle upon which separable controversies are based. (See "Tort Feasors, Removal by.") *Atlantic & P. R. Co. v. Laird*, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120.

CHAPTER XIII.

CITIZENSHIP OF CORPORATIONS.

We have seen that the judicial power of the United States has been declared to extend to controversies between citizens of different States and citizens of a State and aliens, and the words "citizens" and "aliens" have been construed to include corporations.

For fifty years in the judicial history of this country the word "citizen," as used in the Constitution, extending the judicial power of the Federal government to controversies between citizens of different states, was held not to include "corporations." *Hope Ins. Co. v. Boardman*, 5 Cranch, 57-61, 3 L. ed. 36, 37. We find, however, corporations were litigants in these courts from their organization, but in these cases the citizenship of the incorporators was sufficient to create the diversity that gave jurisdiction. *Ibid.*; *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *Commercial & R. Bank v. Slocumb*, 14 Pet. 60, 10 L. ed. 254. Thus we see the citizenship of the individual stockholders controlled the jurisdiction over corporations when it was dependent on diversity of citizenship, and it was permitted the defendant to raise the issue by alleging and showing the citizenship of any or all of the stockholders composing the corporation, so as to defeat the jurisdiction of the Federal court. This remained the rule until 1844, when the Supreme Court of the United States, in an opinion delivered by Mr. Justice Wayne, held that a corporation was a person, though an artificial one, inhabiting and belonging to the State of its birth (*Louisville, C. & C. R. Co. v. Letson*, 2 How. 555, 11 L. ed. 376); and this, though citizens of other States may be members of the corporation, that for all jurisdictional purposes, that is, to sue or be sued, it is a citizen within the meaning of the Constitution and the judiciary act of 1789. Thus we see that the doctrine of the previous cases was entirely

overthrown, and for ten years acquiesced in as a final settlement of the status of a corporation for judicial purposes.

In 1853 in *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953, the question again came before the Supreme Court and, while the jurisdiction to sue a corporation in the State of its organization was maintained, yet the jurisdiction was not sustained upon the ground that the legal entity, both invisible and intangible, was a citizen in the meaning of the Constitution, but it was held that the presumption arising from the habitat of a corporation in the place of its creation was conclusive as to the residence or the citizenship of those who use the corporate name; in other words, the presumption was conclusive that the stockholders and members of the corporation were citizens of the State where the corporation was organized, and the corporation as defendant could not deny it, nor, when suing as plaintiff, could the defendant look beyond the corporation to show want of diversity by reason of the citizenship of its members.

This theory that the citizenship of the members composing the corporation is indisputably a citizenship of the State creating the corporation has been adhered to ever since, and the simple allegation that a party is a body corporate, created and organized under and by virtue of the statutes of a particular State, fixes the citizenship as a jurisdictional question. The doctrine thus established has vastly increased the area of Federal jurisdiction, and the fiction by which it has been accomplished has been severely criticised. We find the courts have since been often pressed to extend the fiction, but have firmly resisted the creation of further artificial citizens for jurisdictional purposes, truly declaring that in what has already been done they had reached the verge of judicial power. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 645; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 555, 40 L. ed. 806, 16 Sup. Ct. Rep. 621; *Barrow S. S. Co. v. Kane*, 170 U. S. 107, 42 L. ed. 967, 18 Sup. Ct. Rep. 526; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 664, 42 L. ed. 317, 17 Sup. Ct. Rep. 925; *Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 370, 34 L. ed. 363, 366, 10 Sup. Ct. Rep. 1004; *National S. S. Co. v. Tugman*, 106 U. S. 121, 27 L. ed.

88, 1 Sup. Ct. Rep. 58; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 283, 20 L. ed. 575; *United States v. S. P. Shotter Co.* 110 Fed. 2; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; *Hollingsworth v. Southern R. Co.* 86 Fed. 356; *Taylor v. Illinois C. R. Co.* 89 Fed. 119.

So, then, corporations, within the jurisdictional act, are citizens, and, upon the theory that individual members are citizens of the State of the incorporation, are indisputably citizens of the State granting the charter (*Ibid.*; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Germania F. Ins. Co. v. Francis*, 11 Wall. 216, 20 L. ed. 78; *Taylor v. Illinois C. R. Co.* supra; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Freeman v. American Surety Co.* 116 Fed. 549; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621); and a citizenship which cannot be changed (*Ibid.*; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Canadian Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363). The rules of diverse citizenship as a basis of jurisdiction in the Federal courts, as heretofore given, apply equally to corporations as to individuals (*Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 698-699; *Hirschl v. J. I. Case Threshing Mach. Co.* 42 Fed. 803; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 772); they are put on the same footing with individuals in respect to jurisdiction in suits by and against them (*Barrow S. S. Co. v. Kane*, 170 U. S. 106, 42 L. ed. 966, 18 Sup. Ct. Rep. 526).

But it is well known that corporations engage in business in other States than where created, and the rule further established that a State may require of a corporation the performance of any conditions not inconsistent with the laws and Constitution of the United States before being admitted to do business within the State. The restrictions and limitations have been as various as the States, and the clear purpose of many of them was to make the foreign corporation a corporation of the State in which it seeks to do business, and thereby

make it amenable to suits in State courts by citizens of the State. But the requirement of State laws, however expressed, as a condition precedent to doing business in a State, cannot change the rule of the citizenship of a corporation as above given, and cannot make the corporation a citizen of that State. *Hollingsworth v. Southern R. Co.* 86 Fed. 353, 355; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Taylor v. Illinois C. R. Co.* 89 Fed. 119; *Canada Southern R. Co. v. Gebhard*, *supra*; *London P. & A. Bank v. Aronstein*, 54 C. C. A. 663, 117 Fed. 607; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 699; *Rowbotham v. George P. Steele Iron Co.* 71 Fed. 758. In a word, you cannot change the corporation into a domestic corporation by prescribing conditions precedent to its entering the State to do business; you cannot change its citizenship so as to affect the jurisdiction of the Federal courts. *Ibid.*; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 560-563, 43 L. ed. 1085-1087, 19 Sup. Ct. Rep. 817; *Southern R. Co. v. Allison*, 190 U. S. 335, 336, 47 L. ed. 1082, 1083, 23 Sup. Ct. Rep. 713; *Consolidated Store-Service Co. v. Lamson Consol. Store-Service Co.* 41 Fed. 834.

To illustrate: A Missouri corporation endowed by the laws of Arkansas with all the powers and privileges of a domestic corporation cannot be sued by a citizen of Missouri in the Federal courts of Arkansas. For jurisdictional purposes it is still a citizen of Missouri, and two citizens from the same State cannot sue in the Federal courts of another State. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Hollingsworth v. Southern R. Co.* 86 Fed. 353. This presumption of citizenship of a corporation in a State where organized accompanies corporations wherever they may do business beyond the limits of such State, and it may sue or be sued in the Federal courts in other States as a citizen of the State of its incorporation.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 562, 43 L. ed. 1086, 19 Sup. Ct. Rep. 817, the court says that a corporation of one State may be made a corpora-

tion of another State by the legislature in regard to property and acts within its territorial jurisdiction, but in order to make corporations already in existence under the laws of one State a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the legislature. The mere grant of privileges and powers as an existing corporation does not do this. *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 296, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Markwood v. Southern R. Co.* 65 Fed. 824; *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 585, 27 L. ed. 520, 2 Sup. Ct. Rep. 432; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 404, 30 L. ed. 1232, 7 Sup. Ct. Rep. 1254; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533. In *Taylor v. Illinois C. R. Co.* 89 Fed. 119, the court, construing a statute of Kentucky, which required a foreign corporation to incorporate therein, and upon compliance provides "it shall become a corporation citizen and resident of the State," held a citizen of Kentucky could sue it in a Federal court. Here we reach a point where this question of the citizenship of corporations as affecting the jurisdiction of the Federal courts becomes apparently complicated, and especially in its application to railroad corporations leasing and operating lines in other States, or in consolidating various independent railway corporations of other States under one system and one name. *Cummins v. Chicago, B. & Q. R. Co.* 193 Fed. 240, 241.

A railway company organized in one State does not make itself a citizen of another State by leasing and operating a railway therein. *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 592. So, a railway company owning and operating a line through several States may receive and exercise powers granted by each State and may, for many purposes, be recognized as a corporation of each State; but that does not, with reference to Federal jurisdiction, make it a citizen of every State it passes through. *St. Joseph & G.*

I. R. Co. v. Steele, 167 U. S. 663, 664, 42 L. ed. 316, 317, 17 Sup. Ct. Rep. 925; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

But sometimes corporations are created by co-operating legislatures of several States, but such corporation cannot have one and the same legal being in both States; they are still distinct corporations deriving their powers from distinct sovereigns; and such corporations, though they be under one system and under one name, cannot unite as plaintiffs in a Federal court against a citizen of either State which chartered them. *Ibid.*; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 585, 27 L. ed. 520, 2 Sup. Ct. Rep. 432; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 505.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, a corporation originally created by the laws of Indiana brought suit in Kentucky against citizens of Kentucky and Illinois. Plaintiff before suit was made a corporation of Kentucky, and pending suit was made a corporation of Illinois by consolidation with an Illinois corporation. The court says the plaintiff was first made a corporation of Indiana, and, whatever may have been done by consolidation or otherwise afterwards, for jurisdictional purposes it remained a corporation of Indiana. It could neither have brought suit as a corporation of both States against a corporation or citizen of either State, nor could it sue or have been sued as a corporation of Kentucky in the Federal courts. The court held jurisdiction to adjudicate its rights as a corporation of Indiana. *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *St. Louis & S. F. R. Co. v. James*, *supra*; *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills*, 62 C. C. A. 295, 127 Fed. 497.

Where three railroad corporations organized under the laws of different States are consolidated under the laws of each State, the consolidated corporation is a citizen of each State, and a citizen of any of the States where organized cannot sue the corporation in the Federal courts in a State of which he is a citizen (*Winn v. Wabash R. Co.* 118 Fed. 55; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Dodd v. Louisville Bridge Co.*

130 Fed. 195, 196; *Paul v. Baltimore & O. & C. R. Co.* 44 Fed. 513; *Baldwin v. Chicago & N. W. R. Co.* 86 Fed. 167; *Westheider v. Wabash R. Co.* 115 Fed. 840; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 169, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Missouri P. R. Co. v. Meeh*, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753), but a citizen of one State of its incorporation may sue it in the Federal courts of another State of its incorporation (*Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 656-662; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 375, 376, 34 L. ed. 368, 10 Sup. Ct. Rep. 1004; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. 609; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986). Thus it seems that a corporation may be so created as to have the constituent parts—citizens of different States, as

First. When it is created a corporation by different States. *Ibid.*; *Graham v. Boston, H. & E. R. Co.* supra; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817; *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 358.

Second. When several corporations of different States are consolidated by the legislatures of the several States. *Ibid.*; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 815, 816; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 283, 20 L. ed. 575; *Muller v. Dows*, 94 U. S. 447, 24 L. ed. 208; *Dodd v. Louisville Bridge Co.* 130 Fed. 195; *Winn v. Wabash R. Co.* and *Baldwin v. Chicago & N. W. R. Co.* supra; *Missouri P. R. Co. v. Meeh*, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753-757.

Third. Whatever may be the actions of States jointly or severally creating corporations, the corporate entity in each State cannot be destroyed to affect jurisdiction. So, then, I state the rule of citizenship and jurisdiction under these conditions as follows:

When a foreign corporation simply becomes an adopted child of another State, by conforming to the requirements of the State, such corporation may be regarded as a citizen of its own

State of incorporation, and may be sued in the Federal courts of the adopted State by its citizens, but not by the citizens of the State of its incorporation. *Ibid.*; *Southern R. Co. v. Allison*, *supra*; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; *St. Joseph & G. I. R. Co. v. Steele*, *supra*; *Taylor v. Illinois C. R. Co.* 89 Fed. 121, 122; *Hollingsworth v. Southern R. Co.* 86 Fed. 353; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 505; *Goodwin v. New York, N. H. & H. R. Co. and St. Louis & S. F. R. Co. v. James*, *supra*. That where several corporations are originally created by several States, which afterwards by authority unite for business purposes under a common name; or independent corporations of various States are consolidated into one corporation by the legislation of the several States originally creating them,—then the consolidated corporation is a citizen of each State, and the citizen of one of the States cannot maintain an action in the Federal courts of *that* State on the ground of diverse citizenship, as the corporation is a citizen of that State, and you must ignore its corporate existence elsewhere (*Ibid.*; *Baldwin v. Chicago & N. W. R. Co.* *supra*; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 656); but a citizen of one State of its incorporation may sue the corporation in the Federal courts of the other States where incorporated (*Ibid.*). Thus, in *Williamson v. Krohn*, *supra*, a consolidated Ohio and Kentucky corporation was sued by a citizen of Ohio in the Federal courts of Kentucky; held, suit properly brought. *Ibid.*; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 812; *Goodwin v. New York, N. H. & H. R. Co.* *supra*.

We see, then, in this discussion of the citizenship of corporations—

First. That a corporation cannot, like a natural person, change its domicil, but its home, residence, domicil and citizenship is where it was originally created, and can be nowhere else. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768,

12 Sup. Ct. Rep. 935; *Germania F. Ins. Co. v. Francis*, 11 Wall. 216, 20 L. ed. 78.

Second. That doing business away from home does not affect its citizenship. *Markwood v. Southern R. Co.* 65 Fed. 817; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 645; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533.

Third. That conditions fixed by a State other than the State of its origin, before it can do business in that state, does not affect its citizenship. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 296, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Markwood v. Southern R. Co.* 65 Fed. 824; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 565, 43 L. ed. 1088, 19 Sup. Ct. Rep. 817; *Hollingsworth v. Southern R. Co.* 86 Fed. 356; *Taylor v. Illinois C. R. Co.* 89 Fed. 120; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 663, 42 L. ed. 316, 17 Sup. Ct. Rep. 925.

Fourth. That two or more States cannot join in creating a single corporation for jurisdictional purposes; the distinct citizenship in each State cannot be destroyed. *Missouri P. R. Co. v. Meeh*, *supra*; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 507; *Walters v. Chicago, B. & Q. R. Co.* 104 Fed. 378; *Clark v. Barnard*, 108 U. S. 452, 27 L. ed. 786, 2 Sup. Ct. Rep. 878; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 165, 30 L. ed. 200, 6 Sup. Ct. Rep. 1009; *Baldwin v. Chicago & N. W. R. Co.* 86 Fed. 167; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 20, 21, 45 L. ed. 406, 407, 21 Sup. Ct. Rep. 240.

Fifth. The corporation must be lawfully created. *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.* 63 C. C. A. 111, 128 Fed. 369. See s. c. in 198 U. S. 177, 49 L. ed. 1003, 25 Sup. Ct. Rep. 640.

Citizenship of Alien Corporations.

The same rules apply to the citizenship of alien corporations; its foreign citizenship of the country where organized is conclusive. *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58. See *Robertson v. Scottish Union & Nat. Ins. Co.* 68 Fed. 173, as to proper allegations of foreign citizenship. *United States v. New York & O. S. S. Co.* 132 C. C. A. 305,

CHAPTER XIV.

CITIZENSHIP OF JOINT STOCK COMPANIES AND OTHER ASSOCIATIONS.

These companies partake of the nature of both partnerships and corporations. There has been much conflict of opinion as to whether joint stock companies are citizens of the State of organization in the light of the Federal jurisdictional acts. *Youngstown Coke Co. v. Andrews Bros. Co.* 79 Fed. 669; *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 Fed. 404; *Bushnell v. Park Bros.* 46 Fed. 209; *Carnegie v. Hurlbert*, 3 C. C. A. 391, 10 U. S. App. 454, 53 Fed. 11; *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 153. In *Imperial Ref. Co. v. Wyman*, 3 L.R.A. 503, 38 Fed. 574, Judge Hammond doubted the policy of extending corporate citizenship to these nondescript organizations. In *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 293, 58 U. S. App. 444, 86 Fed. 585, it was held that a partnership association limited is a corporation. In *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426, the Supreme Court required the citizenship of the members of the association to be alleged, and the question of the jurisdiction of the Federal court was based on citizenship of the members, rather than upon the place of organization. And in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690, 177 U. S. 449, it is held that such associations are not corporations within the rule that in a suit by or against a corporation in a Federal court, it is conclusively presumed to be a citizen of the State creating it. *Thomas v. Ohio State University*, 195 U. S. 211, 212, 49 L. ed. 164, 165, 25 Sup. Ct. Rep. 24. It is now settled that joint stock companies are not corporations within the jurisdictional act, and jurisdiction depends on the citizenship of the members of the association. *Saunders v. Adams Exp. Co.* 136 Fed. 494; *Rountree v. Adams Exp. Co.* 91 C. C. A. 186, 165 Fed. 152.

Partnership.

The same rule would apply to partnership and voluntary associations, who cannot sue or be sued in the Federal courts unless the citizenship of the individuals composing them will permit. *Raphael v. Trask*, 118 Fed. 777; *H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co.* 174 Fed. 669, 672; *Jewish Colonization Asso. v. Solomon*, 125 Fed. 994; *Derk P. Youkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 613; *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 727; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Thomas v. Ohio State University*, 195 U. S. 212, 49 L. ed. 164, 25 Sup. Ct. Rep. 24; *Columbia Digger Co. v. Rector*, 215 Fed. 622.

National Banks.

Up to 1882 the right of the national banks to sue or be sued in the Federal courts was based on their Federal origin. In 1882 these corporations were by act of Congress placed upon the same footing as to jurisdiction in the Federal courts as were banking associations not organized under Federal law. Act July 12, 1882, 22 Stat. at L. 162, chap. 290, Comp. Stat. 1913, sec. 9665. This left the jurisdiction as to these banks, except when the United States was a party, dependent on diversity of citizenship or a Federal question. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325. In 1888 (25 Stat. at L. 443, chap. 891) the jurisdictional and removal act embodied in section 4 the following provision: That national bank associations in all suits in law or equity by or against them shall be deemed citizens of the State in which they are respectively located, and Federal courts had no jurisdiction other than such as they would have in cases between individual citizens of the same State (*First Nat. Bank v. Forrest*, 40 Fed. 705), unless the suit is brought by the United States or its officers, or in winding up the affairs of such banking association. Act Aug. 13, 1888, sec. 4. See appendix p. 869; *American Nat. Bank v. Tappan*, 174 Fed. 431; *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Rankin v.*

Herod, 130 Fed. 390; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495. In Danahy v. National Bank, 12 C. C. A. 75, 24 U. S. App. 351, 64 Fed. 148; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222, and Speckhert v. German Nat. Bank, 38 C. C. A. 682, 98 Fed. 151, the last act has been construed, and the bank declared to have all the rights of a citizen of the State in which such bank is situated to enter the Federal courts; that only jurisdiction based on the Federal origin of these banks was cut off. But Federal courts have exclusive jurisdiction when national banks are insolvent, in winding up its affairs. Ibid.; Wyman v. Wallace and George v. Wallace, supra; Weeks v. International Trust Co. 60 C. C. A. 236, 125 Fed. 370; First Nat. Bank v. Selden, 62 L.R.A. 559, 56 C. C. A. 532, 120 Fed. 212.

See chap. 2, sec. 24, clause 16, of new Code effective January 1st, 1912 (Comp. Stat. 1913, sec. 991 (2)).

Citizenship of Married Women.

While the domicil of the husband is that of the wife, yet this rule would not apply when a married woman has been abandoned. Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Thompson v. Stalman, 139 Fed. 93; Ware v. Wisner, 50 Fed. 312; United States ex rel. Nicola v. Williams, 173 Fed. 626.

A citizen marrying an alien female, she becomes a citizen. U. S. Rev. Stat. sec. 1994, Comp. Stat. 1913, sec. 3948, Fed. Stat. Anno. 1909, p. 69. United States ex rel. Nicola v. Williams, 173 Fed. 626; Comitiss v. Parkerson, 22 L.R.A. 148, 56 Fed. 561; Broadis v. Broadis, 86 Fed. 951; Pequignot v. Detroit, 16 Fed. 211; United States v. Kellar, 11 Biss. 314, 13 Fed. 82; Sprung v. Morton, 182 Fed. 330; Re Nicola, 106 C. C. A. 464, 184 Fed. 322.

But if she becomes an alien by marriage, in order to obtain jurisdiction you must plead the law producing that effect, or jurisdiction will not be shown. Fed. Stat. Anno. 1909, p. 69; Jennes v. Landes, 84 Fed. 74; Wallenburg v. Missouri P. R. Co. 159 Fed. 217; Buckgaher v. Moore, 104 Fed. 947; Jennes v. Landes, 85 Fed. 801.

Aliens.

Closely connected with the diversity of citizenship as a ground of jurisdiction in the Federal courts is the right of an alien to sue and be sued in the courts of the United States. The Constitution, article 3, section 2, clause 1, provides that the judicial power shall extend to all cases in law and equity arising between a State, or the citizens thereof, and foreign States, citizens, and subjects. The judiciary act of 1888 provides that when the controversy is between citizens of a State and foreign States, citizens and subjects, and the amount or value in controversy exceeds the sum of two thousand dollars, exclusive of interest and costs, the circuit courts of the United States shall have jurisdiction. This provision of the judiciary act has, of course, been frequently construed, and I will briefly give the rules affecting the jurisdiction of the Federal courts in dealing with suits in which aliens are parties plaintiff or defendant.

As indicated in the act, aliens are citizens or subjects of a foreign government, and the jurisdiction is given when the controversy is between a citizen or citizens of a State and a citizen or citizens and subjects of a foreign State; and it seems a mere declaration of intention to become a citizen does not make him such, so far as jurisdiction is concerned. *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1. "Alien," as used in the act, is defined in *Hennessy v. Richardson Drug Co.* 189 U. S. 34, 47 L. ed. 698, 23 Sup. Ct. Rep. 532. See *Re Moses*, 83 Fed. 996; *Betzoldt v. American Ins. Co.* 47 Fed. 706.

A citizen within the provisions of the act may sue an alien, or an alien may sue a citizen. Act March 3, 1887, Comp. Stat. 1913, sec. 991(1); *Hennessy v. Richardson Drug Co.* supra. See note to *Sherwood v. Newport News & M. Valley Co.* 55 Fed. 5; *Barlow v. Chicago & N. W. R. Co.* 172 Fed. 515; *Tierney v. Helvetia Swiss F. Ins. Co.* 163 Fed. 83. But such suits are not suits between citizens of different States; therefore the clause of the jurisdictional act requiring suit to be brought in the district of the residence of plaintiff or defendant does not apply to a suit against aliens, and he may be sued in the district where he may be found (*Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Barrow S. S. Co.*

v. Kane, 170 U. S. 112, 42 L. ed. 968, 18 Sup. Ct. Rep. 526), or where valid service can be made on him (*Ibid.*; *Barlow v. Chicago & N. W. R. Co.* supra); *Jarowsky v. Hamburg-American Packet Co.* 104 C. C. A. 548, 182 Fed. 320; *Vestal v. Ducktown Sulphur, Copper & I. Co.* 210 Fed. 377, 378.

The same rule applies to alien corporations. *Barrow S. S. Co. v. Kane*, supra; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Re Hohorst*, 150 U. S. 654, 37 L. ed. 1212, 14 Sup. Ct. Rep. 221.

However, where an alien sues a citizen, he must sue him in the Federal district of which the citizen is an inhabitant (*Campbell v. Duluth*, S. S. & A. R. Co. 50 Fed. 242; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 446; *Miller v. New York C. & H. R. R. Co.* 147 Fed. 772; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401); *Hall v. Great Northern R. Co.* 197 Fed. 488, unless to enforce liens on property, then where property located (*De Hierapolis v. Lawrence*, 99 Fed. 321). Thus, an alien can only sue a corporation where organized (*Ibid.*; *Campbell v. Duluth S. S. & A. R. Co.* supra; *Filli v. Delaware L. & W. R. Co.* 37 Fed. 65; *Denton v. International Co.* 36 Fed. 3; *Sherwood v. Newport News & M. Valley Co.* 55 Fed. 4; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 137); but it seems that a corporation, when sued by an alien in a state court and out of the State of its organization, may remove the suit to a Federal court in such State (*Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 450. See note to *Sherwood v. Newport News & M. Valley Co.* supra; *Stalker v. Pullman's Palace-Car Co.* 81 Fed. 898; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 849; *Duncan v. Associated Press*, 81 Fed. 420). The question has arisen whether an alien when sued in a State court can remove the case to a Federal court. In *Texas v. Lewis*, 12 Fed. 1, and same case in 14 Fed. 65, it is said an alien has the right of removal under the act, but in *Cudahy v. McGeoch*, 37 Fed. 1, it was said that an alien, under the act of 1887, section 3, could not remove a case when sued in a State in which he resided; nonresidence is a requisite. *Walker v. O'Neill*, 38 Fed. 374; *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 2. So, he can remove if sued in a State in which he does not reside.

The right of removal from State to Federal courts by aliens will be discussed under "Removals."

Alien and Citizen Uniting.

An alien cannot unite with a citizen of a State in the citizen's district, and sue citizens of other States. *Conolly v. Taylor*, 2 Pet. 565, 7 L. ed. 521. Nor can citizens of a State unite as defendants an alien and citizen of another State, as all the plaintiffs sued in the plaintiff's district, or all of the defendants if sued in the defendant's district, must be aliens. *Gage v. Riverside Trust Co.* 156 Fed. 1002; *Tracey v. Morel*, 88 Fed. 803; *King v. Cornell*, 106 U. S. 398, 27 L. ed. 61, 1 Sup. Ct. Rep. 313; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 386, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367. These cases hold that where an alien and citizen are joined as defendants in a State court, the alien, having a separable controversy, can remove the case to a Federal court. In *Roberts v. Pacific & A. R. & Nav. Co.* 58 C. C. A. 61, 121 Fed. 787, these cases are reviewed, and the conclusion reached that a suit brought in a State court against a citizen of another State and an alien can be removed by either defendant, because if either had been sued alone the cause could have been removed by either; that in such case, if the defendants joined in a petition for removal, a Federal court could take jurisdiction. This case clearly denies the doctrine stated in *Black's Dillon, Removal of Causes*, sections 68, 84.

When the suit has been brought by or against an alien, and the jurisdiction once attaches in the Federal court, the fact that a citizen was admitted as a coplaintiff or codefendant upon application would not defeat the Federal jurisdiction. *Graham v. Boston, H. & E. R. Co.* 14 Fed. 754. So, where an alien having brought suit in a Federal court under the act permitting it, the fact that the alien becomes a citizen pending the suit does not divest the jurisdiction. *Betzholdt v. American Ins. Co.* 47 Fed. 707; *Conolly v. Taylor*, 2 Pet. 556, 7 L. ed. 518,

Alien Suing Alien.

An alien cannot sue an alien in the Federal courts, either

alone or by joining citizens (Pooley v. Luco, 72 Fed. 561-564; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 386, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Rae v. Grand Trunk R. Co. 14 Fed. 402; Hartog v. Memory, 23 Fed. 835; Montalet v. Murray, 4 Cranch, 47, 2 L. ed. 545; Gage v. Riverside Trust Co. 156 Fed. 1007); unless there be a Federal question, when citizenship becomes unimportant, as we will hereafter see (Gage v. Riverside Trust Co. 156 Fed. 1002).

As to Allegation of Alienage.

The act of Aug. 13, 1888, gives cognizance of controversies between citizens of a State and foreign States, citizens or subjects, and it was held, in view of this language, that a plaintiff describing himself as a "resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain," is not a sufficient averment of alienage; that Canadians are subjects of the King of England, and should be so described. Rondot v. Rogers Twp. 25 C. C. A. 145, 47 U. S. App. 290, 79 Fed. 677; Von Voight v. Michigan C. R. Co. 130 Fed. 398; Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; Jennes v. Landes, 84 Fed. 74. So, one cannot allege a foreign corporation as a citizen of Great Britain. Oregonian R. Co. v. Oregon R. & Nav. Co. 27 Fed. 279. "Citizens of the Republic of France" is a sufficient allegation of alienage. Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; new Code, sec. 24, cl. 1, Comp. Stat. 1913, sec. 991.

(See Bill, p. 272.)

CHAPTER XV.

TERRITORIAL JURISDICTION AND PLACE OF SUIT.

Having referred generally to resident and nonresident citizenship as affecting jurisdiction in the Federal courts, I will now take up the statutory conditions as to the place of suit, that is, the judicial district in which suit can be brought. It is embodied in the new Code, sec. 51 (Comp. Stat. 1913, sec. 1033), as follows:

“Except as provided in the five succeeding sections (being sections 52 to 56 inclusive), no person shall be arrested in one district for trial in another in any civil action in any district court, and except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant.”

In order to fully understand the decisions as to place of suit or venue, it is necessary to briefly refer to the judiciary acts of 1789 and 1875.

In the original judiciary act of 1789 the venue was fixed as follows: Jurisdiction was given over all suits at law or in equity between a citizen of the State in which the suit is brought and a citizen of another State, and the place of suit was fixed in these words: “No suit shall be brought against *an inhabitant of the United States* in any other district than that of which he is an inhabitant, or *in which he shall be found* at the time of serving the writ.” Then came the general act of 1875, greatly enlarging the jurisdiction of the Federal courts, but did not change the clause affecting the district of suit. However, the words, “an inhabitant of the United States,” in the act of 1789, were substituted by the words “any person.”

The above section of the new Code following the act of 1888 changed the venue clause materially by leaving out the words, "in which he may be found at the time of serving the writ or commencing the proceedings," and the *place of suit* was confined to *the district* of which the defendant is an inhabitant, except when the jurisdiction is founded on the fact that the controversy is between citizens of different States, then it shall be brought only in the district of the residence of either the plaintiff or defendant. Kentucky Coal Lands Co. v. Mineral Development Co. 191 Fed. 906; Smellie v. Southern P. R. Co. 197 Fed. 643; Western U. Teleg. Co. v. Louisville & N. R. Co. 201 Fed. 932; Reich v. Tennessee Copper Co. 209 Fed. 880; Smith v. Reed, 210 Fed. 968; United States v. Gronich, 211 Fed. 548; St. Louis Southwestern R. Co. v. S. Samuels & Co. 128 C. C. A. 188, 211 Fed. 588; Re Keashey & M. Co. 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; United States v. Southern P. R. Co. 49 Fed. 299, 300; McCormick v. Walthers, 134 U. S. 41-43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485; Miller v. Pennsylvania R. Co. 91 Fed. 298; Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; Jewett v. Garrett, 47 Fed. 630; United States Fidelity & G. Co. v. Woodson County, 76 C. C. A. 114, 145 Fed. 144.

It is thus seen that for one hundred years a defendant could be sued in his own district, or in any Federal district in which he may be found. Many hardships necessarily attended this practice of catching a transient defendant, and it has in a measure been corrected, in the act of 1888, by only permitting a citizen to be sued out of his district when jurisdiction depended on diversity of citizenship, and equalizing the inconvenience by permitting the plaintiff to go to defendant's district, or making the defendant come to plaintiff's district to be sued. Bank of Winona v. Avery, 34 Fed. 81; Bostwick v. American Finance Co. 43 Fed. 897, 898, and authorities cited. St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 33 Fed. 385; Rawley v. Southern P. R. Co. 33 Fed. 305.

So we have in personal suits two forums when jurisdiction depends on diversity of citizenship, but when jurisdiction is based on a Federal question, or any other provision of the jurisdictional act, there is only one place of suit under the act of 1888, and that is in the district of which the defendant is an in-

habitant. *Jewett v. Garrett*, 47 Fed. 632, 633. Therefore the rule is, under the present act, that in personal suits between citizens of different States, you must sue the defendant in his own State, and in the judicial *district* of which he is an inhabitant, or you may sue him in your State and in the Federal *district* of which you are an inhabitant, if your jurisdiction in the Federal court depends on diversity of citizenship, and defendant can be served there. *Ibid.*; *Shaw v. Quincy Min. Co.* 145 U. S. 448, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Danciger v. Wells, F. & Co.* 154 Fed. 379; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 734; *Goddard v. Mailler*, 80 Fed. 422; *Dinzy v. Illinois C. R. Co.* 61 Fed. 50; *Kibbler v. St. Louis & S. F. R. Co.* 147 Fed. 880, 881; *Pitkin County Min. Co. v. Markell*, 33 Fed. 387; *American Locomotive Co. v. Dickson Mfg. Co.* 117 Fed. 972. But if the jurisdiction depends on other provisions of the Federal act, such as a Federal question, or an alien suing a citizen, then suit must be brought in the district whereof the defendant is an inhabitant. *Ibid.*; *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Galveston H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Cramer v. Singer Mfg. Co.* 59 Fed. 74; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287, 288; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 601. *Reich v. Tennessee Copper Co.* 209 Fed. 880; new Code, sec. 51, Comp. Stat. 1913, sec. 1033.

Venue When Jurisdiction Depends on Both Diversity and Federal Question.

In *Cound v. Atchison, T. & S. F. R. Co.* supra, the jurisdiction of the Federal court was based on on both diversity of citizenship and a Federal question. The case was brought in the residence district of plaintiff against the defendant, a foreign corporation, but operating its railroad in plaintiff's district of residence and citizenship. A plea to the jurisdiction was sustained, on the ground that plaintiff, to sue in his own district, can only do so where diversity of citizenship is the *only* ground of jurisdiction. Thus a very strict construction was given to the word "only" in the latter clause of the first section of the act

of 1888 (Comp. Stat. 1913, sec. 991 (1)). The narrow view of the word "only" was attacked in *Whittaker v. Illinois C. R. Co.* 176 Fed. 131, but the court, in sustaining the former case, seemed to think the question was not an open one, citing *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485. See *Adriance P. & Co. v. McCormick Harvesting Mach. Co. supra*.

Exceptions to the Rule.

The provision that the defendant *must* be sued in his own district does not apply to "patent" suits. U. S. Rev. Stat. sec. 711, subdiv. 5, act of 1897 (Comp. Stat. 1913, sec. 1030). Re *Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Re *Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221. These cases were decided under the act of 1887, but under the act of 1897, cited above, the suit may be brought either in defendant's residence district, or in any district in which the infringement of the patent was committed, if the defendant can be served there. *Bowers v. Atlantic, G. & P. Co.* 104 Fed. 887; *Westinghouse Air-Brake Co. v. Great Northern R. Co.* 31 C. C. A. 525, 59 U. S. App. 592, 88 Fed. 261, 262. New Code, chap. 4, sec. 48 (Comp. Stat. 1913, sec. 1030); Act March 3, 1897. Nor does it apply where a citizen sues an alien. *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.* 133 Fed. 931, 932; *Earl v. Southern P. Co.* 75 Fed. 610; *Barlow v. Chicago & N. W. R. Co.* 172 Fed. 516; *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324. In *United States v. Southern P. R. Co.* 49 Fed. 301, it was said that the first section of the act of 1887 as to venue did not control, where the United States was a party plaintiff; but in *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715, a different conclusion is reached, and the United States, when coming into its courts as a litigant, is subject to the requirements of sec. 24, new Code (Comp. Stat. 1913, sec. 991).

Again, the rule of venue does not apply when brought for infringement of copyrights. U. S. Rev. Stat., sec. 4966, U. S. Comp. Stat. 1901, p. 3415; *Lederer v. Rankin*, 90 Fed. 449; *Spears v. Flynn*, 102 Fed. 7; *Lederer v. Ferris*, 149 Fed. 250.

See Appendix. "Rules for practice and procedure in Copyright Cases." Nor do the limitations apply when suit is brought under the interstate commerce law to recover damages. Interstate commerce act, secs. 8-9. *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 981; *Edmunds v. Illinois C. R. Co.* 80 Fed. 79; *Kalispell Lumber Co. v. Great Northern R. Co.* 157 Fed. 845.

So, the rule does not apply in suits arising under special laws of Congress creating rights and giving exclusive jurisdiction to the Federal courts such as acts concerning Federal revenues; or Federal anti-trust laws (26 Stat. at L. 209, chap. 646, Comp. Stat. 1913, sec. 9009), or alien contract labor (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294), or United States public lands (23 Stat. at L. 321, chap. 149, Comp. Stat. 1913, sec. 4997), or condemning land for public use (25 Stat. at L. 357, chap. 728, Comp. Stat. 1913, sec. 6909). Special acts of the character above stated usually fix the venue, and must be followed (*United States v. Mooney*, 116 U. S. 107, 108, 29 L. ed. 551, 552, 6 Sup. Ct. Rep. 304); otherwise the suit may be brought where the defendant may be found.

So, it may be said generally that the clause of the judiciary act requiring suit in the residence district of defendant applies only to cases where State and Federal courts have concurrent jurisdiction. *Re Keasbey & M. Co.* and *Re Hohorst*, supra; *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 985-987; *Lederer v. Ferris*, 149 Fed. 251.

Inhabitant Defined.

You will observe that the word "inhabitant" is used instead of "citizen," in the new Code, sec. 51 (Comp. Stat. 1913, sec. 1033); "the district of which a party is an inhabitant," is the language. This is construed to mean the district of his residence. *Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935. The word "inhabitant" has the same meaning as "citizen." *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 819, 820; *Bicycle Stepladder Co. v. Gordon*, 57 Fed. 529, 530; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 504, 38 L. ed. 251, 14 Sup. Ct. Rep. 401. See *United States v. Southern P. R. Co.* 49 Fed. 297; *Holmes v. Oregon*

& C. R. Co. 9 Fed. 229. And "citizenship" means *permanent* residence or domicile, which is residence acquired as a final abode. *Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Gaddie v. Mann*, 147 Fed. 956; *Mitchell v. United States*, 21 Wall. 352, 22 L. ed. 587; *Marks v. Marks*, 75 Fed. 324; *Chambers v. Prince*, 75 Fed. 176; *Ex parte Petterson*, 166 Fed. 545, but jurisdiction depends on "citizenship," not residence. *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 624; *Marks v. Marks*, 75 Fed. 321; *Wolfe v. Hartford Life & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Rockling v. McKinstry*, 185 Fed. 843; *Harding v. Standard Oli Co.* 182 Fed. 421; *United States v. Gronich*, 211 Fed. 548.

I will observe here, but it will be fully illustrated hereafter, that this provision of the act concerning venue does not affect the general jurisdiction of the courts, but only provides a personal exemption or privilege, which may be waived if not pleaded. *Platt v. Massachusetts Real Estate Co.* 103 Fed. 706; *Cowell v. City Water Supply Co.* 96 Fed. 769, and authorities cited. *Duncan v. Associated Press*, 81 Fed. 418; *Louisville & N. R. Co. v. Fisher*, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 69; *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 902; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286.

District of Suit When Two or More Plaintiffs and Defendants.

The rules heretofore given as to the particular State and district of suit can be applied without any practical difficulty when there is only one plaintiff and one defendant, but some difficulty is apparent when there are numerous plaintiffs and defendants residing in different States, or various districts of the same State, or in the several divisions of the same district, which then existed in some States. *Goddard v. Mailler*, 80 Fed. 423, 424. The rule is that in personal actions, where there are two or more plaintiffs or defendants, suit must be brought in the State and district of plaintiffs' or defendants' citizenship, if the jurisdiction is based on diversity of citizenship and residence; and if brought in plaintiffs' residence district, and there be two or more plaintiffs, then all the plaintiffs must be

inhabitants of the district; but if brought in defendants' residence district, then all of the defendants must be inhabitants of the district. *Lengel v. American Smelting & Ref. Co.* 110 Fed. 21; *Freeman v. American Surety Co.* 116 Fed. 550; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* 42 Fed. 81; *Jenkins v. York Cliffs Imp. Co.* 110 Fed. 809, 810; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 76. That is, the words "plaintiff" and "defendant," as before stated, are used in the act in a collective sense. *Ibid.* It means that parties from different States may join in suing a defendant in defendant's district; or any number of defendants, if they all reside in the same district, or that several parties plaintiff, if they reside in the same district, may sue any number of defendants from different States in the district of plaintiffs' residence.

It will be seen that this change in the venue clause of the jurisdictional act was in furtherance of the spirit of the act, the purpose of which was to limit the jurisdiction of the Federal court, and to narrow the door of entrance. The restrictive effect of this clause has been very inconvenient at times to litigants, who would prefer a jurisdiction reasonably free from local prejudices and influence.

A case involving a personal suit may be clearly within Federal jurisdiction; yet if there was more than one indispensable defendant, the suit could not be brought if they lived in different districts or States; and when jurisdiction is dependent on divers citizenship, while the suit may be brought in the residence district of the plaintiff, yet if there is more than one plaintiff jointly interested, and they live in different districts, it would be fatal to the suit *if objection* was made. *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303.

However, this rule as to cases in which there are several defendants residing in different districts of a State does not apply under sec. 52 of the new Code (Comp. Stat. 1913, sec. 1034), providing, that where there are two or more districts in a State, and there are two or more defendants residing in different districts of the State, suit may be brought in one of the districts in which one of the defendants may reside, and process

may issue to the defendant or defendants residing in other districts of the same State. This section now controls all cases not of a local nature, and process may be sent to any other district of the State, provided suit is brought in a district in which one of the defendants reside and of which he is a citizen or inhabitant.

See discussion of sec. 740 of U. S. Rev. Stat.

CHAPTER XVI.

RULE OF VENUE UNDER OTHER PROVISIONS OF THE JUDICIARY ACT AND EXCEPTIONS.

We have seen by section 51 of the new Code (Comp. Stat. 1913, sec. 1033), suit must be brought in a district of which the defendant is an inhabitant, but there are exceptions to this rule created by statute.

First. By U. S. Rev. Stat. sec. 741, it is provided that in suits of a local nature, if there be but one defendant, or there be more than one residing in different districts from the *locus* of the subject-matter of the suit, in which district the suit is brought, the plaintiffs may have process to the district or districts where the defendant or defendants reside. See also acts 1902, reorganizing the Federal districts in Texas. See sec. 54, chap. 4, new Code, embodying U. S. Rev. Stat. sec. 741. By section 742 it is provided that in a suit of a local nature, where the land or other subject-matter of a fixed character lies in more than one district within the same State, suit may be brought in either district, and process issued and executed as in section 741. See sec. 55, chap. 4, new Code, embodying U. S. Rev. Stat. sec. 742. Prior to the passage of this act in 1858, embodied in the above sections, there was no way of reaching a defendant beyond the district in local suits, nor where there were several defendants residing beyond the district of suit process could not reach them. The conditions were embarrassing to Federal courts of equity when all parties interested in the subject-matter must be brought in to enter a proper decree, and this embarrassment increased with the growth of the country and the multiplicity of Federal districts in the same State. See *Burke v. Mountain Timber Co.* 224 Fed. 592, and cases cited as to venue in local suits.

While these changes greatly enlarged the field of Federal process and the efficiency of its equity courts, yet you will observe these statutes were confined to reaching parties and differ-

ent districts of the same State, and there was yet no way by which parties out of the State, but interested in the subject-matter, could be reached by Federal process, however great the necessity for bringing them in. Section 737 of the U. S. Rev. Stat. only provided for proceeding without them, if not indispensable; that is, where they may have been only proper or necessary parties. It provided for dismissing parties, and not bringing them into the suit. The language of that act was "Where there are several defendants in a suit in equity, and one or more of them are neither inhabitants of, nor found in the district of suit, and do not voluntarily appear, the court may proceed without them to adjudicate between the parties properly before the court." See sec. 50, chap. 4, new Code, embodying sec. 737, U. S. Rev. Stat.

But under this statute, if the parties were *indispensable*, the court could not proceed. U. S. Rev. Stat. sec. 737; Eq. Rule 39; Taylor v. Holmes, 14 Fed. 515; Shields v. Barrow, 17 How. 142, 15 L. ed. 158; Hazard v. Durant, 19 Fed. 475, 476; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Gregory v. Swift, 39 Fed. 711, 712; Oberlin College v. Blair, 70 Fed. 419, 420; d'Auxy v. Porter, 41 Fed. 68; Detweiler v. Holderbaum, 42 Fed. 338; Hicklin v. Marco, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; Wall v. Thomas, 41 Fed. 620. Thus we see, if nonresidents had an interest in the land or personal property within the State, the Federal courts of equity were powerless to give relief to one who would litigate the title, or seek to remove the cloud or encumbrance thereon, unless the nonresident should voluntarily appear or come within the reach of the court's process. The case of Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825, illustrates the difficulties stated above, and which Congress subsequent to that case sought to remove. The first act passed was in 1872 (U. S. Rev. Stat. sec. 738), wherein provisions were made to reach nonresidents interested in real or personal estate in the district of suit. This act only applied in terms to courts of equity, but in 1875 was enlarged and applied to suits to enforce any *equitable* or *legal* claim to property, or lien on, or remove any encumbrance, lien, or cloud upon title to real or personal property within the district in which the suit is brought. It provided that in such suits, where one or more of the defendants were not inhabitants of the State or found in the district

where suit is brought, the court may order the absent defendant to appear and plead and answer or demur. If practicable, the defendants are to be served with a copy of the order (*Batt v. Procter*, 45 Fed. 517), and if not, the service is authorized to be made by publication for six weeks. See sec. 8, chap. XVII. See *infra*, chapter 58, where the forms for this procedure are given and the practice stated, p. 334. This section of the U. S. Rev. Stat. sec. 738, as enlarged in the judiciary act of 1875 as sec. 8, and retained in the new Code, sec. 57 (Comp. Stat. 1913, sec. 1039), chap. 4, has been construed in the following cases, and, being remedial, it will be seen that it has been construed liberally except in the issue of the process and its service. The principle embodied in the act of 1858 (U. S. Rev. Stat. secs. 741, 742), was extended, the field of Federal process was pushed beyond State limits, and the Federal courts made vastly more efficient in settling rights of property where nonresidents were interested in the particular character of cases set forth in the section. (See sec. 8, act 1875, chaps. 17 and 58 herein.) *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285; *American F. L. M. Co. v. Benson*, 33 Fed. 456; *Kent v. Hosinger*, 167 Fed. 619; *Forsyth v. Pierson*, 9 Fed. 801; *United States v. American Lumber Co.* 80 Fed. 309; *Lancaster v. Asheville Street R. Co.* 90 Fed. 129; *Pollitz v. Farmers' Loan & Trust Co.* 39 Fed. 707; *Wheelwright v. St. Louis, N. O. & O. Canal & Transp. Co.* 50 Fed. 709; *Carpenter v. Talbot*, 33 Fed. 538; *Single v. Scott Paper Mfg. Co.* 55 Fed. 553, but see *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954; *Morris v. Graham*, 51 Fed. 56; *McBee v. Marietta & N. G. R. Co.* 48 Fed. 243; *Greeley v. Lowe*, 155 U. S. 74, 39 L. ed. 75, 15 Sup. Ct. Rep. 24; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 366, 33 L. ed. 182, 9 Sup. Ct. Rep. 781; *Arndt v. Griggs*, 134 U. S. 327, 33 L. ed. 921, 10 Sup. Ct. Rep. 557; *United States v. Union P. R. Co.* 98 U. S. 604, 25 L. ed. 151.

CHAPTER XVII.

SECTION 57 OF THE NEW CODE AND SECTION 740 OF THE U. S. REV. ST. APPLIED.

Thus, in brief, is shown the gradual extension of territorial jurisdiction, through the issuing and service of process, beginning in 1789, with the subpoena having no extraterritorial force, and the service of which must be made within the territorial jurisdiction of the court (*Jewett v. Garrett*, 47 Fed. 630, 631; *Herndon v. Ridgeway*, 17 How. 425, 15 L. ed. 100; *Romaine v. Union Ins. Co.* 28 Fed. 639), and ending in 1875 with the power of the court to direct its process to any of the United States where the defendant may be found. This section does not enlarge the jurisdiction of the court, but only gives greater scope to its process, so as to exercise the jurisdiction given in section 1 of the judiciary act, by creating an exception to the rule that the defendant must be sued in the district of his residence.

Section 8 of the act of 1875 is as follows:

“That when in any suit commenced in any circuit court of the United States, to enforce any *legal* or *equitable* lien upon, or claim to, or to remove any encumbrance or lien or cloud upon title to *real* or *personal* property within the district where suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a certain day to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons, etc.” See sec. 57 of new Code, embodying sec. 8 of the act of 1875, Comp. Stat. 1913; sec. 1039. (See Process.) *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 943, and authorities cited.

Under this section of the act and the statutes fixing the venue of suits of a local nature, the jurisdiction is determined by rea-

son of the fact that the subject-matter of the suit or property is within the jurisdiction of the courts and in the nature of a proceeding *in rem* (Shainwald v. Lewis, 5 Fed. 517; Ames v. Holderbaum, 42 Fed. 341; Lancaster v. Asheville Street R. Co. 90 Fed. 129; Hultberg v. Anderson, 170 Fed. 660; Cowell v. City Water Supply Co. 96 Fed. 770; Ladew v. Tennessee Copper Co. 179 Fed. 245; Jones v. Gould, 80 C. C. A. 1, 149 Fed. 153, S. C. 141 Fed. 698), and it matters not whether any or all of the plaintiffs, or any or all of the defendants, are resident citizens of the district of suit (Ibid.; Single v. Scott Paper Mfg. Co. 55 Fed. 555; Seybert v. Shamokin & Mt. C. Electric R. Co. 110 Fed. 811; Spencer v. Kansas City Stock-Yards Co. 56 Fed. 741; Greeley v. Lowe, 155 U. S. 58-73, 39 L. ed. 69-75, 15 Sup. Ct. Rep. 24; Deck v. Whitman, 96 Fed. 890; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 488, 489, 19 Mor. Min. Rep. 253; Ladew v. Tennessee Copper Co. supra) and 218 U. S. 357, 54 L. ed. 1069, 31 Sup. Ct. Rep. 89; Western U. Teleg. Co. v. Louisville & N. R. Co. 201 Fed. 944, and where the case falls within section 8, then a citizen of one State may sue a citizen of another State in a third State (Single v. Scott Paper Mfg. Co. supra; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Grove v. Grove, 93 Fed. 869; De Hierapolis v. Lawrence, 99 Fed. 321; Carpenter v. Talbot, 33 Fed. 537). Again, where the case falls within the section, it may be at law, as ejectment (Spencer v. Kansas City Stock-Yards Co. supra), or in equity, as in foreclosing a lien or removing a cloud from title (Merrihew v. Fort, 98 Fed. 899; Ames v. Holderbaum, 42 Fed. 341; Cowell v. City Water-Supply Co. 96 Fed. 769; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Morrison v. Marker, 93 Fed. 692).

It has been held that a bill for specific performance comes under section 8 of the act of 1875, if the statutes of the State provide that a contract to convey land becomes a legal or equitable claim to or lien on the land, and if the relief provided by the statute permits publication to bring in absent or nonresident defendants, and a decree for the land can be entered. This is permitted in some States, and the United States courts will follow the State practice in this respect. Single v. Scott Paper Mfg. Co. 55 Fed. 553-556; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Bennett v. Fenton, supra.

Otherwise a contract to convey land or specific property does not come under this clause, as it is a personal action, and thus must be brought in the district of the residence of plaintiff or defendant. *Adams v. Heckscher*, 80 Fed. 742; *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954. It has also been held that a suit in equity to cancel a deed for fraud comes under this clause (*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed 178, 9 Sup. Ct. Rep. 781; *Evans v. Charles Scribner's Sons*, 58 Fed. 303); so to cancel a note (*Manning v. Berdan*, 132 Fed. 382).

Again, section 8 is applicable when the jurisdiction rests upon a Federal question, or in a suit that is ancillary where the property is in possession of the courts. *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285.

Section 8 also applies in partition. *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24. But it has been held not to apply to a suit to establish the ownership of stock in a corporation, as the situs of stock is with the nonresident holder. *Jellenik v. Huron Copper Min. Co.* 82 Fed. 778, see 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559, reversing the case, and holding, under section 8, the suit could be brought, and that the stock was to be deemed personal property within the district where the suit was brought, being the habitation of the corporation. This case was followed in *Jones v. Gould*, 141 Fed. 698.

Section 740 U. S. Rev. Stat.

I now come to U. S. Rev. Stat. sec. 740, embodied in sec. 52 of the new Judicial Code, Comp. Stat. 1913, sec. 1034, creating another exception to the rule that the defendant must be sued in the district of his residence. This section provides that when a State contains more than one district, every suit not of a local nature must be brought, if one defendant, where the defendant resides; but if there be two or more defendants residing in different districts of the State, you may bring the suit in either district of the residence of one of the defendants, and a duplicate writ may be directed to the marshal of the other district for service. This was a part of the act of 1858, providing for service of process in local suits, already referred to.

It has been strenuously urged that, after the passage of section 8, act of 1875, that section 740 was repealed, and that this section 8 specially retained in the act of 1888 had superseded all statutes prescribing the place where parties may be sued; and now section 8 is the only exception to the rule that a defendant can only be sued in the district whereof he is an inhabitant. *Greeley v. Lowe*, 155 U. S. 72-75, 39 L. ed. 74-76, 15 Sup. Ct. Rep. 24; *Cely v. Griffin*, 113 Fed. 981.

Judge Lacombe, of the southern district of New York, maintains the repeal of the act of 1858, sections 740-742, U. S. Rev. Stat., and would not permit service on nonresident defendants, except in the cases and under the conditions provided for in section 8 of the act of 1875. *New Jersey Steel & I. Co. v. Chormann*, 105 Fed. 532, 533; *Seybert v. Shamokin & Mt. C. Electric R. Co.* 110 Fed. 810.

In *Greeley v. Lowe*, *supra*, it is intimated that, as no exception was made in the act of 1875 for the cases provided for in sections 740, 742, U. S. Rev. Stat., it is at least open to doubt as to whether suits will lie against nonresident defendants under those sections. On the other hand, in *Goddard v. Mailler*, 80 Fed. 423, and *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L.R.A. 109, 49 Fed. 608, in comprehensive and well-reasoned opinions, the contrary view has been maintained.

The act of 1888 purports to cover the general and territorial jurisdiction of the Federal courts, and as it makes no provision for suing citizens of the same State living in different districts of the State, it tends to show that the legislative mind considered that this feature of Federal jurisdiction had been sufficiently provided for by section 740.

I submit the better reasoning is found in the cases which hold section 740 in force. *John D. Park & Sons Co. v. Bruen*, 133 Fed. 807. In *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 493, 50 L. ed. 285, 26 Sup. Ct. Rep. 133, the court below had dismissed the case for want of jurisdiction, as defendants did not reside in the district of Illinois in which the suit was brought. The plaintiff in error contended that the suit was brought under section 740, providing for service on defendants out of the district of suit, while the defendant in error contended that section 740 was repealed and the case was properly dismissed. The Supreme Court sustained the jurisdic-

tion in the case because the Special Statutes creating the Federal districts in Illinois had provided, in the language of section 740, for service on defendants out of the district of suit, and therefore did not deem it necessary to decide whether section 740 had been repealed or not. There is nothing in its language bringing it in direct conflict with the present judiciary act of 1888, and therefore within the repealing clause 6 of that act (*Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *Third Nat. Bank v. Harrison*, 3 McCrary, 162, 8 Fed. 721), and we may read section 740 into the first section of the act, in all cases not of a local nature and not resting on diversity of citizenship only for jurisdiction. But whatever may be the rule applied in other districts, it seems that in Texas, Congress has specially provided for service of process on defendants who do not reside in the district. See Judicial Code, sec. 52, Comp. Stat. 1913, sec. 1034.

By an act of 1879, in rearranging the Federal districts in Texas, it was enacted that if there be more than one defendant, and they reside in different districts or in different divisions of the same district, the plaintiff may sue in either district, or division of the district, and may send duplicate writs to the other defendants, on which the plaintiff or his attorney shall indorse that the writ thus sent is a true copy of a writ sued out of the proper division. U. S. Rev. Stat. Supp. p. 417. The last clause was evidently a mistake, and not enforced, and subsequently corrected in 1902.

Again, by act of 1902, adding the southern district to the Federal districts of Texas, it is provided that if there be more than one defendant and they reside in different divisions of the district, or in different districts, the plaintiff may sue in either division of, or in either district, and send duplicate writs to the other defendants on which the clerk shall endorse, etc.

So that as to Texas, with her four Federal districts, subpoenas from any of her districts may run into any other district, or divisions of a district, if the conditions under the statute exist which permit it; that is, where there are two or more defendants residing in the different districts, or different divisions of a district, you may sue in either district or division of a district in which one of the defendants reside, and bring in all other defendants who are proper, necessary or indispensable.

ble parties. Acts Congress 1879 and 1902. Attention is called to the special laws creating the Federal districts in Texas, because of the fact that Congress in creating Federal districts in other States has uniformly adopted the provisions of section 740 in providing for service on defendants out of the district of suit, and it was unquestionably decided in *Petri v. F. E. Creelman Lumber Co.* supra, that special laws creating new Federal districts, and providing for service on defendants out of the district of suit, were not repealed by the general jurisdictional acts, though in conflict 199 U. S. 498; *John D. Park & Sons Co. v. Bruen*, 133 Fed. 806; *Re Dunn*, 212 U. S. 388, 53 L. ed. 564, 29 Sup. Ct. Rep. 299.

But the general provisions of section 740 as re-enacted in section 52 of the new Federal Judicial Code, are now applicable to all districts, all previous laws creating or changing these districts having been expressly repealed by section 297 of such Code, Comp. Stat. 1913, sec. 1274. *Doscher v. United States Pipe Line Co.* 185 Fed. 959.

By the express provisions of section 297 of the new Judicial Code, "all acts and parts of acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing the times or places of holding court therein enacted prior to Feb. 1, 1911," are repealed.

And see section 53, chap. 4, new Code, requiring suit to be brought in the division of the district in which the defendant lives, or if he move, then one defendant residing in different divisions of the district the suit may be brought in either of the divisions and process served in all of the divisions.

By section 58, new Code, any suit may be transferred from one division to another. Effective January 1st, 1912.

CHAPTER XVIII.

WHERE A CORPORATION MAY BE SUED.

Having discussed the citizenship of corporations, and that under the jurisdictional act they are citizens, I will now discuss where they may be sued with reference to the State and district. The general rule is that a corporation must be sued in the State of its incorporation and in the district whereof it is an inhabitant; and within the jurisdictional act it is not considered a citizen, resident, or inhabitant of any State other than that in which it has been incorporated. *Wolff v. Choctaw O. & G. R. Co.* 133 Fed. 601; *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 65; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 770; *Campbell v. Duluth, S. S. & A. R. Co.* 50 Fed. 241; *National Typographic Co. v. New York Typographic Co.* 44 Fed. 711; *Amsden v. Norwich Union F. Ins. Soc.* 44 Fed. 517.

If incorporated in several States, a citizen of each State of its incorporation cannot sue it in the Federal court of that State of which he is a citizen, but may sue it in a Federal court in a State of which he is a nonresident, *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 358; *Burger v. Grand Rapids & I. R. Co.* 22 Fed. 563; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986; *Johnson v. Union P. R. Co.* 145 Fed. 252. But a railroad operated in several States by license or lease has no citizenship in such States, and may be sued by citizens of the States in which it so operates, in the Federal Courts. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 562, 563, 43 L. ed. 1086, 1087, 19 Sup. Ct. Rep. 817; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Markwood v. Southern R. Co.* 65 Fed. 823; *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 596, 597;

Morgan v. East Tennessee & V. R. Co. 48 Fed. 705. Such are the general rules as established since 1888.

Prior to the passage of the judiciary act of that year, a corporation could be sued in any State where found; that is, in any State where it accepted the conditions prescribed by the State and had by its agents established its business. *Hayden v. Androscoggin Mills*, 1 Fed. 93-95; *Ex parte Schollenberger*, 96 U. S. 375, 376, 24 L. ed. 854; *United States v. Southern P. R. Co.* 49 Fed. 302; *Southern P. Co. v. Denton*, 146 U. S. 207, 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Re Keasbey & M. Co.* 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273, and authorities cited; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 707; *United States v. S. P. Shotter Co.* 110 Fed. 2. By sec. 51 of the new Code, Comp. Stat. 1913, sec. 1033, following the act of 1888 we have seen that the words used in the act of 1875, to wit, "or in which he shall be found at the time of serving process or commencing proceedings," were repealed, and the following language substituted: "But when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of plaintiff or defendant." So that now we have established both as to corporations as well as individuals, that if jurisdiction be founded on the diversity of citizenship, the plaintiff, whether an individual or a corporation (*Central Trust Co. v. Virginia, T. & C. Steel & I. Co.* 55 Fed. 773; *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 164, 37 L. ed. 1039, 14 Sup. Ct. Rep. 66), can sue a nonresident corporation either in plaintiff's district, when the defendant corporation is doing business in the State (*United States v. Bell Teleph. Co.* 29 Fed. 17), or in the State and district of which defendant corporation is an inhabitant, which, as we have seen, can only be the State of its organization. *Wolff v. Choctaw R. Co.* 133 Fed. 602; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705-707; *Filli v. Delaware, L. & W.*

R. Co. 37 Fed. 66; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421; *Dinzy v. Illinois C. R. Co.* 61 Fed. 51; *Minford v. Old Dominion S. S. Co.* 48 Fed. 1.

From the above authorities we have the rule briefly stated as follows: A nonresident corporation cannot be sued in the Federal courts, without its consent, in a State in which it is merely doing business (*Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44), except by a citizen of that State in the district of which he is an inhabitant; or, to state the rule more fully. A corporation incorporated in one of the States of the Union cannot be compelled to answer to a civil suit at law or in equity in a circuit court of the United States held in another State or district, even if the corporation has a usual place of business in that district, unless the plaintiff is a citizen and resident of the district. *Ibid.*; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 204, 37 L. ed. 703, 13 Sup. Ct. Rep. 859; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 136, 137; *Galveston H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Wange v. Public Service R. Co.* 159 Fed. 190; *Haight & F. Co. v. Weiss*, 84 C. C. A. 224, 156 Fed. 328. Bear in mind, this rule only applies when jurisdiction depends on diversity of citizenship; on any other ground, as the existence of a Federal question, the corporation can only be sued, without its consent, in the Federal courts in the State of its incorporation and district of its habitation. *Ibid.*; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287, 288; *Cramer v. Singer Mfg. Co.* 59 Fed. 75; *Re Keasbey & M. Co.* 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 273; *Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935. The provision of the judiciary act fixing venue as above set forth is not fundamental, or essential to the exercise of judicial power by the Federal courts, and therefore a corporation sued in the Federal courts of any State may by general appearance waive the right to object that the suit is not brought in a district of its, or the plaintiff's, residence. *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Interior Constr. &*

Improv. Co. v. Gibney, 160 U. S. 219, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Southern P. Co. v. Denton, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982.

In *United States v. American Bell Teleph. Co.* 29 Fed. 17, and *Mecke v. Valley Town Mineral Co.* 89 Fed. 114, it was held that, in the absence of a voluntary appearance, three conditions must concur in order to give a Federal court jurisdiction *in personam* over a corporation in a State other than of its organization.

First. It must appear that the defendant corporation is carrying on business in such State or district where suit is brought. *Barnes v. Western U. Teleg. Co.* 120 Fed. 550; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Boardman v. S. S. McClure Co.* 123 Fed. 614; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 263, and authorities cited. *Audenreid v. East Coast Mill. Co.* 124 Fed. 697; *Baldwin v. Pacific Power & Light Co.* 199 Fed. 293, 294; *Noel Const. Co. v. George W. Smith & Co.* 193 Fed. 495, and cases cited.

Second. That it is managed by some officer or agent appointed by and representing the corporation in such State. *Ibid.*

Third. The existence of some local law making foreign corporations generally amenable to suit in the State as a condition precedent to doing business in the State, either express or implied. *Williams v. Gold Hill Co.* 96 Fed. 457; *Dinzy v. Illinois C. R. Co.* 61 Fed. 49; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Berry v. Knights Templars' & M. Life Indemnity Co.* 46 Fed. 441; *Hill v. Empire State-Idaho Min. & Developing Co.* 156 Fed. 797; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 157, 47 L. ed. 994, 23 Sup. Ct. Rep. 707; *Barron v. Burnside*, 121 U. S. 200, 30 L. ed. 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 10, 26 L. ed. 644; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Ex parte Schollenberger*, *supra*; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 358.

Under this third ground it may be stated that the States, in fixing the conditions under which foreign corporations can do business, generally providing for issuing process, and service on foreign corporations. It may be further stated as to the third condition, that the statutes of States cannot abridge or impair the jurisdiction of Federal courts over foreign corporations (*Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 894); that no limitation of suability fixed in such local statutes can affect Federal jurisdiction, it otherwise appearing (*Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526), and while Federal courts will follow the statutory conditions of States, it will not be bound by them, if in their opinion they obstruct the due administration of justice, or are in conflict with the Constitution and laws of the United States. *Barron v. Burnside*, *supra*; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. 896; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 874; *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 18; *Colby v. Cleaver*, 169 Fed. 206, 207. In a word, such statutes are not essential to the jurisdiction of the Federal court. *Barrow S. S. Co. v. Kane*, *supra*; *Wilson Packing Co. v. Hunter*, 8 Biss. 429, Fed. Cas. No. 17,852.

Let us now illustrate the rules as above stated. In *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44, jurisdiction rested upon diversity of citizenship. *Denton*, a citizen of Red River county in Texas, and therefore an inhabitant of the eastern district of Texas, sued the Southern Pacific Railway Company, a Kentucky corporation, in the United States court at Austin, which is in the western district of Texas, alleging that the defendant was doing business in the western district of Texas, having an agent there, one Jessup, etc. The corporation filed a demurrer to the jurisdiction, thus admitting the facts, but claiming that no jurisdiction was shown. The Supreme Court of the United States sustained the demurrer, holding that since the act of 1888 had repealed the provision in the act of 1875, permitting suit where the defendant may be found, and required the suit to be brought in the district in which plaintiff was an inhabitant, or in the district and State of which defendant was an inhabitant (in this case Kentucky) that the suit in this case could only have been

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brought in the eastern district of Texas or in Kentucky. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 545; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 707; *Stonega Coal & Coke Co. v. Louisville & M. R. Co.* 139 Fed. 271, 272. The contention was that doing business in the western district of Texas, and having an agent there, was equivalent to consenting to be sued in the western district, under the statute of 1887 of Texas, requiring a foreign corporation transacting business in Texas to file with the secretary of state a certified copy of its articles of incorporation, and authorizing service of process on any of its agents and officers in the State.

The Supreme Court said that such a statute might subject the corporation to suit in any of the districts under the statutes of 1789 and 1875 (*Ex parte Schollenberger*, 96 U. S. 375, 24 L. ed. 854; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 706, 707; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138-146, 28 L. ed. 379-382, 4 Sup. Ct. Rep. 364), but such an agreement between the State and corporation since 1888, as interpreted in *Shaw v. Quincy Min. Co.* *supra*, could not compel the defendant to be sued other than in the State and district of its residence, or the residence of the plaintiff. *Ibid.*; *Southern P. Co. v. Denton*, 146 U. S. 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44. See *Wange v. Public Service R. Co.* 159 Fed. 190.

The case of *Shaw v. Quincy Min. Co.* *supra*, referred to, raised the question whether a nonresident could sue a corporation doing business in the State where sued, such corporation being chartered by a citizen of another State. The plea to the jurisdiction was sustained because it presented a case where neither plaintiff nor defendant were citizens of the State of suit.

You will find in *Zambrino v. Galveston, H. & S. A. R. Co.* 38 Fed. 449, and in *Riddle v. New York, L. E. & W. R. Co.* 39 Fed. 290, both cases tried shortly after the act of 1888 was passed, it was held that a foreign corporation could be sued in the district of a State in which it was doing business through its agents; but in *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 66; *Booth v. St. Louis Fire Engine Mfg. Co.* 40 Fed. 1; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 695, and *Na-*

tional Typographic Co. v. New York Typographic Co. 44 Fed. 711, a different conclusion was reached, which conclusion was sustained by the Supreme Court in the cases above referred to.

What District is the Domicil of a Corporation.

But the question often arises, when a corporation is "doing business" in various Federal districts of a State, as to which of the districts it is an inhabitant. The rule may be stated, that it is an inhabitant of the district in which it has its principal office or headquarters, and having its principal office in one district, it cannot be considered an inhabitant of another Federal district. *Re Dunn*, 212 U. S. 375, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; *Weed v. Centre & C. Street R. Co.* 132 Fed. 151; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 601; *Galveston, H. & S. A. R. Co. v. Gonzales*, supra; *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 818; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421; *Weller v. Pennsylvania R. Co.* 113 Fed. 503. Thus, in *Galveston, H. & S. A. R. Co. v. Gonzales*, supra, it was held that a corporation organized under the laws of a State in which there are four Federal districts, and having its principal office in one of the districts, must be sued there, though it operates its line of railway through the other districts; and this rule applies whether the suit be brought by an alien or nonresident.

CHAPTER XIX.

DOING BUSINESS.

A foreign corporation to be sued in a State other than the State of its organization must be "doing business" in the State where sued. *Green v. Chicago, B. & Q. R. Co.* 147 Fed. 767; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 255, 53 L. ed. 787, 29 Sup. Ct. Rep. 445, and authorities cited; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 263, and authorities cited; *Boardman v. S. S. McClure Co.* 123 Fed. 614; *Kibbler v. St. Louis & S. F. R. Co.* 147 Fed. 882. (See service of process on corporations.) If not "doing business," legal service cannot be had, even though State laws authorize it. *Ibid.*; *Swann v. Mutual Reserve Fund Life Asso.* *supra*; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 130; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807. See also *Barrow S. S. Co. v. Kane*, *supra*.

This question is one of general, not local, law. *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Barrow S. S. Co. v. Kane*, *supra*. A State may prescribe conditions, except as to interstate matters, permitting business, but it cannot prescribe in advance what acts will be considered as doing business. *Ibid.*; *Cyclone Min. Co. v. Baker Light & P. Co.* 165 Fed. 996; *Tennis Bros. Co. v. Wetzel & T. R. Co.* 140 Fed. 196. It is therefore sometimes difficult to determine whether a foreign corporation is doing business in a State so that it

may be sued there, and I can only suggest through illustration when service can be perfected so as to give jurisdiction on a foreign corporation in another State. A New York corporation collecting and distributing news, but with no office or place of business in a State, is not doing business (*Evansville Courier Co. v. United Press*, 74 Fed. 918), but a paper having an agent in another State soliciting advertisements and making contracts can be sued by service on such agent (*Palmer v. Chicago Herald Co.* 70 Fed. 886). A bank receiving premiums due to an insurance company for the convenience of policy holders does not constitute doing business so as to be bound by service on the officers of the bank. *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 923; *Cooper v. Brazelton*, 68 C. C. A. 188, 135 Fed. 476. A corporation selling goods through a drummer does not make service on the drummer good. *American Wooden-Ware Co. v. Stem*, 63 Fed. 676. But a manufacturing corporation outside of the State where sued, employing another corporation to sell goods for them, is doing business in such State, and service on its agents is good. *Corie v. Tuscaloosa Mfg. Co.* 76 Fed. 891; *United States Rubber Co. v. Butler Bros. Shoe Co.* 132 Fed. 398. Lending money in a State by a foreign corporation to one who contracts to pay in the foreign State is not doing business so that service would be good in the State where the money is loaned. *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 595; *Cæsar v. Capell*, 83 Fed. 412-414. Collecting dues, premiums, and assessments on policies in a State is doing business, though State license is withdrawn. *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 157, 47 L. ed. 994, 23 Sup. Ct. Rep. 707; *Sparks v. National Masonic Acci. Asso.* 73 Fed. 285; *Connecticut Mut. L. Ins. Co. v. Spratley*, *supra*. Effecting insurance through correspondence is not doing business. *Hazeltine v. Mississippi Valley F. Ins. Co.* 55 Fed. 749; *Good Hope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 637. A railroad company having no tracks in the district is not doing business because it hires an office and maintains an agent in the district to solicit business. *Green v. Chicago, B. & Q. R. Co.* 205 U. S. 530, 534, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595, and authorities cited. *Goepfert v. Compagnie Generale Transatlantique*, 156 Fed. 196. So, having an agent in a State

soliciting orders for a foreign manufacturer, but not making contracts, is not doing business within the rule permitting service of process to be made. *Fawkes v. American Motor Car Sales Co.* 176 Fed. 1010; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 293, 7 A. & E. Ann. Cas. 219. So sales of goods by a foreign corporation through salesmen to citizens of another State, belonging to the operation of interstate commerce, are not affected by restrictive laws of the States requiring conditions precedent to "doing business" in a State. *Kirven v. Virginia-Carolina Chemical Co.* supra; *Julius Kessler & Co. v. Perilloux*, 127 Fed. 1011. However, it is held that the interstate commerce clause does not apply to a foreign corporation maintaining a continuous agency in a State from which orders are solicited and the goods delivered to purchasers. *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206.

Nor are isolated contracts of this character between individuals of a State and foreign corporations "doing business" in the State. *Kirven v. Virginia-Carolina Chemical Co.* supra; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* 55 C. C. A. 93, 118 Fed. 239; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 734, 28 L. ed. 1139, 5 Sup. Ct. Rep. 739; *Frawley v. Pennsylvania Casualty Co.* supra; *Allgeyer v. Louisiana*, 165 U. S. 592, 41 L. ed. 836, 17 Sup. Ct. Rep. 427; *Cæsar v. Capell*, 83 Fed. 409, 413; *Clews v. Woodstock Iron Co.* 44 Fed. 31; *Hazeltine v. Mississippi Valley F. Ins. Co.* supra; *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 593; *Good Hope Co. v. Railway Barb Fencing Co.* supra; *Robinson v. American Linseed Co.* 147 Fed. 886; *Chesapeake & O. R. Co. v. Stojanski*, 112 C. C. A. 310, 191 Fed. 720.

It has been stated as a test, that if a corporation of one State engages in business in another State under such circumstances that by the law of the latter State the corporation may be sued in the courts thereof, then it may be sued in the Federal courts in that State, if the case would be otherwise within the Federal jurisdiction. *Dinzey v. Illinois C. R. Co.* 61 Fed. 51; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 358; *Ex parte Schollenberger*, 96 U. S. 375, 24 L. ed. 854; *Mannington v. Hocking Valley R. Co.* 183 Fed. 157.

Corporations doing business in a State other than that of its incorporation can only be sued in a Federal court by citizens of that State, and not by citizens of another State. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 771; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287; *Central Trust Co. v. Virginia, T. & C. Steel & I. Co.* 55 Fed. 769; *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Central Trust Co. v. McGeorge*, 151 U. S. 134, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; *Re Keasbey & M. Co.* 160 U. S. 228, 229, 40 L. ed. 404, 405, 16 Sup. Ct. Rep. 273. Neither nonresidents nor aliens can thus sue a foreign corporation, whether doing business in the State or not, out of the State of its incorporation. *Denton v. International Co.* 36 Fed. 1; *Campbell v. Duluth S. S. & A. R. Co.* 50 Fed. 241, 242; *Re Hohorst*, 150 U. S. 662, 37 L. ed. 1214, 14 Sup. Ct. Rep. 221; *National Typographic Co. v. New York Typographic Co.* 44 Fed. 711; *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 820; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 65; *Barlow v. Chicago & N. W. R. Co.* 164 Fed. 768.

Alien Corporations.

What has hitherto been said about "foreign" corporations and the rules applicable to jurisdiction over them applies wholly to corporations created and organized under the authority and laws of one of the United States "doing business" in another State than that of its organization. I come now to speak of the rules of jurisdiction applicable to "alien" corporations, or such as have been organized under the laws of a foreign country, "doing business" in the United States through its agencies.

Alien corporations are not citizens of or inhabitants of any State within the jurisdictional acts (*Shaw v. Quincy Min. Co.* 145 U. S. 453, 36 L. ed. 772, 12 Sup. Ct. Rep. 935), and therefore jurisdiction cannot be based on diversity of citizenship, but under the provision of the statute giving jurisdiction where there shall be a controversy between citizens of a State and foreign States, citizens or subjects. The provision of the statute providing the place of suit does not apply to aliens,

and therefore they may be sued in any Federal district where they may be found.

In *Barrows S. S. Co. v. Kane*, 170 U. S. 103, 42 L. ed. 965, 18 Sup. Ct. Rep. 526, an action was brought in the circuit court of the United States for the southern district of New York by Kane, a citizen of New Jersey, against the steamship company, a corporation of Great Britain, for injuries received as a passenger on a voyage from Ireland. The contention was that, being a corporation organized in Great Britain, no suit *in personam* could be brought in this country without its consent. That the statutes of New York made no provision for nor conferred on any court the power to issue process in an action by a nonresident; therefore the circuit court of the United States could acquire no jurisdiction; that is, a citizen of New Jersey could not bring in a Federal court in New York a suit against an alien corporation. The corporation had an agent, an office in New York city, upon whom service was made. The court answering the contention said:

First. That the courts of the United States were not dependent on State statutes for perfecting service and acquiring jurisdiction.

Second. That the conferring of jurisdiction by the Constitution where citizens and aliens had a controversy was sufficient to support the process and judgment.

Third. That, the defendant being an alien corporation, the subsequent provisions of the judiciary act of 1888, providing for the place of suit, did not apply, and therefore an "*alien*" can be sued in any district in which valid service can be made or where found. *Re Hohorst*, *supra*; *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401. See *Service of Process on Corporations*; *Jarowski v. Hamburg-American Packet Co.* 104 C. A. 548, 182 Fed. 320.

CHAPTER XX.

WAIVER OF JURISDICTION.

In closing the subject as to the *locus* of the suit, I wish again to state that the right or privilege to be sued in the district of which one is an inhabitant is not jurisdictional in the sense of being fundamental. If the jurisdiction of the Federal court otherwise exists, then as to where the suit shall be brought may be waived by entering a general appearance or by answer.

It is a personal exemption to be pleaded in order to be available (*St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Baltimore & O. R. Co. v. Doty*, 67 C. C. A. 38, 133 Fed. 869; *Burch v. Southern P. Co.* 139 Fed. 350; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705; *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 8, and authorities cited; *United States Fidelity Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 144; *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 260; *Ex parte Schollenberger*, 96 U. S. 378, 24 L. ed. 855; *Rodgers v. Pitt*, 96 Fed. 676, and authorities cited; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 847); but where it is apparent in the bill a demurrer is sufficient, and it is not necessary to file a plea in abatement (*Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179).

, *Acts of Waiver.*

Any answer to the merits which may, under the old rules, have been set up by demurrer, plea, or answer, waives the privilege. (*Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 219, 220, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272; *Central Trust Co. v. McGeorge*, 151 U. S. 133, 134, 38 L. ed. 100, 101, 14 Sup. Ct. Rep. 286; *McPhee & McG. Co. v. Union*

P. R. Co. *supra*; *Re Moore*, 209 U. S. 506, 507, 52 L. ed. 911, 912, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164; *Marks v. Marks*, 75 Fed. 332; *Rodgers v. Pitt*, 96 Fed. 676, 677, and authorities cited; *Southern P. Co. v. Denton*, *supra*; *Texas & P. R. Co. v. Cox*, 145 U. S. 603, 36 L. ed. 832, 12 Sup. Ct. Rep. 905. See *Reinstadler v. Reeves*, 33 Fed. 308, for exceptions. *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303); or by pleading to the merits (*Ibid.*; *Southern Exp. Co. v. Todd*, 5 C. C. A. 432, 12 U. S. App. 351, 56 Fed. 104; *Collins v. Stott*, 76 Fed. 613; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 810; *Carter-Crume Co. v. Peurrung*, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 442; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Van Doren v. Pennsylvania R. Co.* *supra*; *Midland Contracting Co. v. Toledo Foundry & Mach. Co.* 83 C. C. A. 489, 154 Fed. 798; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477).

A motion to dismiss under new rule 29, because of insufficiency of facts to constitute a valid cause of action waived (*Ibid.*; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 130, 35 L. ed. 660, 11 Sup. Ct. Rep. 982; *Scott v. Hoover*, 99 Fed. 247) because such a motion goes to the merit of the bill as under the old rules (*Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 817). If, however, the motion raises only an issue of jurisdiction, as that the bill shows on its face a want of jurisdiction, then such motion does not waive the privilege. *Shaw v. Quincy Min. Co.* 145 U. S. 453, 36 L. ed. 772, 12 Sup. Ct. Rep. 935.

Should the motion be overruled, answering over does not waive the right to insist on the issue on appeal. *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 272. Again, where there is an objection to jurisdiction filed with the answer to the merits, and the issue on the merits contested, the waiver of jurisdiction would be so held. *Clark-Herrin-Campbell Co. v. H. B. Claffin Co.* 134 C. C. A. 229, 218 Fed. 429. The rule, then, is that the failure of defendant to present the issue as to want of jurisdiction by motion, or answer before filing an answer to the merits is a waiver of jurisdiction of the court, because of being sued in the wrong district. *Less v. English*, *supra*, and authorities; *Interior*

Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Lehigh Valley Coal Co. v. Yensavage, 134 C. C. A. 275, 218 Fed. 549.

Taking of Depositions as Waiver.

In Stonega Coal & Coke Co. v. Louisville & N. R. Co. 139 Fed. 271, it was held that defendant did not waive objection to jurisdiction by appearing and participating in taking depositions on the suit before issues made up (Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 539), but not where the case has proceeded beyond the pleading.

Removal as waiver of jurisdiction will be discussed under "Removals."

Who May Object for Want of Parties.

When there are several defendants, some of whom are not inhabitants of the district in which suit is brought, the question has arisen whether the defendants who are inhabitants of the district may not take the objection that others are not. The rule may be stated that the resident defendant cannot object, that his codefendant is sued out of his district. Smith v. Atchison, T. & S. F. R. Co. 64 Fed. 1; Jewett v. Bradford Sav. Bank & T. Co. 45 Fed. 801. The joinder is not jurisdictional unless the nonresident chooses to make it so. Schultz v. Highland Gold Mines Co. 158 Fed. 341; Dominion Nat. Bank v. Olympia Cotton Mills, 128 Fed. 182; Lowry v. Tile, Mantel & Grate Asso. supra. It is intimated in Interior Constr. Co. v. Gibney, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272, that under certain conditions the resident defendant may object to answering without the presence of the nonresident indispensable party. Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 84 Fed. 77, id., 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 252; Blanchard v. Bigelow, 109 Fed. 275; Continental Adjustment Co. v. Cook, 152 Fed. 655.

CHAPTER XXI.

HOW ISSUE OF CITIZENSHIP RAISED AND PROOF THEREON.

Rule 29, which prescribes and regulates the presentation of defenses to a suit in equity, abolishes pleas and demurrers, but it does not abolish the issues formerly raised by them; the manner of raising the issues of law and fact arising in the cause has only been changed, so that motions as now required must be drawn in the nature of demurrers and pleas, as required under the old rules. *Alexander v. Fidelity Trust Co.* 215 Fed. 794. See *Ralston Steel Car Co. v. National Dump Car Co.* 222 Fed. 590. If the diversity of citizenship is not apparent in the bill the issue may be raised by motion in the nature of a demurrer, as indicated in the form hereinafter given. If the diversity of citizenship is sufficiently set forth, but not in fact true, it may be raised by motion to dismiss in the nature of a plea, or it may be raised in the answer. To properly understand how to formulate the motion or answer, and the character of proof necessary, we must bear in mind that citizenship, so far as the jurisdictional act is concerned, must be that character of citizenship that identifies itself with a *particular State*; and citizenship as defined in the 14th Amendment to the Constitution of the United States does not affect the rule. *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Marks v. Marks*, 75 Fed. 324; *Hammerstein v. Lyne*, 200 Fed. 165.

Again, you must distinguish between judicial and political citizenship. *Marks v. Marks*, 75 Fed. 327-332. As soon as a citizen moves to a State *animo manendi*, he becomes a judicial citizen, and may sue or be sued instantaneously in a Federal court and in the Federal district in which he may for the time reside, though he cannot vote. For jurisdictional purposes, then, citizenship requires: First, residence; second, intention of permanency.

State citizenship and "domicil" are the same thing (*Marks*

v. Marks, 75 Fed. 324; Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780); for domicil means residence *animo manendi*. Collins v. Ashland, 112 Fed. 178; Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 543; Harton v. Hawley, 155 Fed. 493; Marks v. Marks, 75 Fed. 331. Residence may exist *animo revertendi*, and for this reason the allegation of residence, as will hereafter be seen, is not sufficient. Citizenship and residence are not convertible terms. Sharon v. Hill, 26 Fed. 337-342; Robertson v. Cease, 97 U. S. 648, 24 L. ed. 1058; Pacific Mut. L. Ins. Co. v. Tompkins, *supra*, and authorities cited; Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; Chambers v. Prince, 75 Fed. 177; McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 579; Eisele v. Oddie, 128 Fed. 945; Jones v. Subera, 150 Fed. 464; Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; Horne v. George H. Hammond Co. 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602. A person may have several residences, but only one domicil. Tambrino v. Galveston, H. & S. A. R. Co. 38 Fed. 453, and authorities cited. "Residence," however, is an element of citizenship. McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 577; Anderson v. Watt, 138 U. S. 695, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449. See Robertson v. Cease, *supra*; Harding v. Standard Oil Co. 182 Fed. 421; United States v. Gronich, 211 Fed. 548.

Burden of Proof.

The burden of proof is on the defendant to defeat jurisdiction when the issue is raised. Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 436; Collins v. Ashland, *supra*; National Masonic Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801; Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780; Rucker v. Bolles, 25 C. C. A. 600, 49 U. S. App. 358, 80 Fed. 504; Hartog v. Memory, 116 U. S. 590, 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521. (See "Plea, Burden of Proof.") Fleming v. Laws, 112 C. C. A. 27, 191 Fed. 283.

With these observations as to the character of citizenship necessary to jurisdiction, I will proceed to discuss how the issue is raised and proved.

It will be seen, in discussing the bill in equity, that the diversity of citizenship must appear in the bill with certainty, as it will not be inferred from allegations. *International Bank & T. Co. v. Scott*, 86 C. C. A. 248, 159 Fed. 59; *Boston Safe-Deposit & T. Co. v. Racine*, 97 Fed. 817; *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *Timmons v. Elytown Land Co.* 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781. If it does not appear the appellate courts presume the court below acted without jurisdiction. *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; *Horne v. George H. Hammond Co.* 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 167. If it does not so appear in the bill, you may (*Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44) move to dismiss as above stated. *Tice v. Hurley*, 145 Fed. 391; *Sanbo v. Union P. Coal Co.* 146 Fed. 80; *Miller-Magee Co. v. Carpenter*, 34 Fed. 433. However, being fundamental, there is no exclusive way of raising the issue. See *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.* 181 Fed. 974; *Lader v. Tennessee Copper Co.* 179 Fed. 245; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616. See *Wright v. Skinner*, 136 Fed. 694.

Raising by Motion in the Nature of a Demurrer.

When the issue as to citizenship is based purely upon the record, it may be raised by motion or in the answer, which should be in the nature of a demurrer, and the following form may be used:

Title as in bill.

In the District Court of the United
States for the.....District of
..... Sitting at

And now comes the defendant (or defendants) (naming them) and would show to the Court that it appears from the bill filed in this cause that the jurisdiction of this court depends on diversity of citizenship and that said diversity is not shown, for that plaintiff and defendants, or one

of the defendants (naming him) are as appears citizens of the same state, and not different states, (or that both plaintiff and defendants are aliens; or that there are aliens on both sides of the controversy with citizens of states), (or that neither plaintiff nor defendants are citizens of States in which the suit is brought; or that the citizens of the same State are suing in a third State; or two or more citizens of different States are suing a defendant from a third State; or any other form of objection appearing under the rules of jurisdiction heretofore stated). Wherefore defendant prays the court to dismiss the bill and that he recover his costs in this behalf incurred.

R. F.,
Solicitor.

See form in *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 271.

This character of motion must be tried by the record.

Raising Issue by Motion in Nature of Plea.

If the record shows a sufficient allegation of citizenship which may not be true, the issue may be raised in the answer or by motion in the nature of a plea, as a proper allegation of citizenship is confessed if not denied. *Hoppenstedt v. Fuller*, 17 C. C. A. 623, 36 U. S. App. 271, 71 Fed. 99. The old rule that a proper allegation of citizenship, though denied in the answer, is admitted unless a plea is filed, construing old rule 39, now abrogated, is no longer the rule. See *Crown Cork & Seal Co. v. Standard Brewery*, 174 Fed. 252; *Klenk v. Byrne*, 143 Fed. 1008; *York County Sav. Bank v. Abbot*, 131 Fed. 980. If the issue is raised by motion or in the answer it should be set up as follows:

Title as in bill.

And now comes the defendant (or defendants, naming them) and would show to the court that it appears from said bill that the jurisdiction of this Court is dependent on diversity of citizenship of the parties to the suit, and that so much of the allegations of said bill as sets up the diversity of citizenship is not true for defendant avers that the plaintiff, A. B., is not a citizens or resident of the State of, as alleged by him but was at the commencement of this suit, and is now, a citizen of the State of, of which State the defendant, C. D., was at the commencement of this suit a citizens and resident, (or that plaintiff and defendant are citizens of different states from the one in which the suit is brought, or any other objection as stated in the form above may be set up in the motion or answer). All of which the defendant avers to be true and pleads the same in bar of the bill and prays the court to dismiss the bill with his costs in this behalf incurred

R. F.,
Solicitor.

If the defendant be a corporation the same form may be used except that the motion should allege that the defendant is not a corporation organized under the laws of the State of as alleged, nor is it a citizen of or inhabitant of the State of, where the corporate meetings are held and the corporate business is transacted.

If the plaintiff's citizenship is attacked you may state it as follows:

It is not true as averred that plaintiff is a citizen of the State of, as alleged by him, but was, at the commencement of this suit and now is a citizen and resident of the State of being the same State of defendant's citizenship and residence. All of which defendant avers to be true, etc.

If the objection be that plaintiff is not suing the foreign corporation in the district of plaintiff's residence, then say, after the words: "that the jurisdiction depends on the diversity of citizenship,"

That it is not true that plaintiff at the commencement of this suit was nor now is a resident and citizen of the District or of the State of where this suit is brought, but he was, at the commencement of this suit and now is, a citizen and resident of the District of, all of which defendant alleges to be true. Wherefore he says not this court but the District Court of the United States for the District of, of which plaintiff is and was an inhabitant and citizen, has jurisdiction and not this court.

Raising the Issue in the Answer.

By rule 29 the issue may be raised in the answer, and if so raised the evidence under the issue may be taken in connection with the evidence on the merits of the whole case, and the issue may be submitted with the case on final hearing; or it may be called up and disposed of before the final hearing, which is the better practice. When the issue is raised in the answer, the form as given for the "Motion" in the nature of a plea may be used. However, in *Lindsay-Bitton Live Stock Co. v. Justice*, it is said that in a Code State where a general denial puts in issue every material allegation of the complaint, a general denial puts in issue an allegation of diverse citizenship in the Federal courts. 111 C. C. A. 525, 191 Fed. 163, and cases cited; *Gaddie v. Mann*, 147 Fed. 955-959.

Setting Issue Down for Hearing.

By rule 29 these defenses, however raised, may be separately disposed of before the final trial, or when called for final trial, in advance of the trial of the issues on the merits of the case. So, where the motion to dismiss the bill or any part thereof is made, the motion may be set down for hearing by *either* party upon five days' notice; and where it raises an issue of fact, five days is allowed to answer, and upon failure to do so a decree *pro confesso* may be entered on the issue. The motion to dismiss may also be set for hearing on a "motion day," as fixed under rule 6; or the judge of the district may fix any time or place as he may consider reasonable to make, and direct all rulings and proceedings for the advancement, conduct, and hearing of causes. New rule 6.

Burden of Proof.

As before said, the burden of proof is on the defendant to prove to a "legal certainty" facts relied upon to defeat the jurisdiction. *Ibid.*; *Wiemer v. Louisville Water Co.* 130 Fed. 244; *Adams v. Shirk*, *supra*; *Chambers v. Prince*, 75 Fed. 176, fact cases; *Canadian P. R. Co. v. Wenham*, 146 Fed. 207; *Marks v. Marks*, 75 Fed. 324; *Collins v. Ashland*, 112 Fed. 175; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Southwestern Electric R. Co. v. Hageman*, 57 C. C. A. 348, 121 Fed. 262; *Loomis v. Rosenthal*, 67 Fed. 369; *Covel v. Chicago, R. I. & P. R. Co.* 123 Fed. 452; *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. 674; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539; *Caldwell v. Firth*, 33 C. C. A. 439, 62 U. S. App. 594, 91 Fed. 177; *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1; *Denver v. Sherrett*, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226; *Rucker v. Bolles*, *supra*; *Kingman v. Holthaus*, 59 Fed. 305, 309; *Pike County v. Spencer*, 112 C. C. A. 433, 192 Fed. 13, and cases cited; *Gaddie v. Mann*, 147 Fed. 955; *Kilgore v. Norman*, 119 Fed. 1008.

How Tried.

When the issue is raised, the judge may try the issue or submit it to a jury. *Wetmore v. Rymer*, 169 U. S. 120-122, 42 L. ed. 684, 685, 18 Sup. Ct. Rep. 293. See *Canadian P. R. Co. v. Wenham*, 146 Fed. 206, 207.

CHAPTER XXII.

WANT OF NECESSARY CITIZENSHIP APPEARING IN TRIAL.

But you may not be aware of the true facts of citizenship so as to raise the issue by motion or answer, and the true state of the citizenship may be developed by your evidence when the depositions on the merits are read, or from instruments filed in evidence. Remembering, as has been stated, that jurisdiction by diversity of citizenship is fundamental, that is, if the Federal jurisdiction is based upon it, and it does not exist, the court should not proceed further (act of 1875, sec. 5), you may therefore meet it by motion to dismiss at any stage of the proceeding, if it should appear. It is really the duty of the court *sua sponte* to dismiss the case without either motion or suggestion, if the want of jurisdiction clearly appears. However, you may take the initiative by filing a motion. *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 541, 542; *Williams v. Nottawa*, 104 U. S. 212, 26 L. ed. 719; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Graves v. Corbin*, 132 U. S. 590, 33 L. ed. 468, 10 Sup. Ct. Rep. 196; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Simon v. House*, 46 Fed. 319; *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606. This duty upon the part of the court to dismiss the case is made obligatory by the fifth section of the act of 1875. Prior to that time the jurisdiction of the court had to be raised by plea or answer when properly alleged in the bill. *Kardo Co. v. Adams*, — C. C. A. —, 231 Fed. 954. But this rule was changed by the act of 1875, sec. 5, new Code sec. 37, Comp Stat. 1913, sec. 1039:

“That in any suit commenced in a district court or removed from a State court, it shall be made to appear to the satisfaction of said court, *at any time* after such suit has been brought or removed, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been

improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

It is seen that the district courts cannot escape the duty it imposes. The Supreme Court has frequently enforced this section on appeal, though no issue whatever was raised in the court below, or the Supreme Court. *Ibid.*; *Turner v. Farmers' Loan & T. Co.* 106 U. S. 555, 27 L. ed. 274, 1 Sup. Ct. Rep. 519; *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552.

It is said that if the evidence discloses the want of jurisdiction, or that the jurisdiction of the Federal court has been imposed upon, you should file a motion to dismiss.

Under the old rules the want of jurisdiction appearing in the trial of the cause may have been discovered generally in advance of the trial, as the evidence was taken by depositions, and abundant opportunity thus given to discover the want of jurisdiction if it existed; but under new rule 46, all testimony in an equity cause is required to be taken orally, as at law, except when otherwise provided by the new rules, or by statute. The rule seeks, as regards the taking of evidence in the cause, to make the trial in equity similar to a trial in law, and the taking of depositions in equity are exception as at law, and not the general rule as under the old rules. *North v. Herrick*, 203 Fed. 591.

So now where the evidence is taken orally, one would have to wait its development at the trial, in order to file a motion to dismiss.

The motion may be as follows:

A. B.		In the District Court of the United
vs.	In Equity.	States for the..... District of
C. D.	, sitting at

And now comes C. D., the defendant, and moves the court to dismiss this suit and that he go hence with his costs in this behalf incurred, for that it appears by the evidence or instruments taken and filed in the cause that..... (naming him) is not a citizen of the State of, as alleged (or whatever may be the fact affecting the jurisdic-

tion), and therefore no diversity of citizenship exists as alleged and upon which jurisdiction in this suit is based.

Wherefore defendant prays that because the suit does not really and substantially involve a controversy properly within the jurisdiction of the court, that the same be dismissed.

R. F.,
Solicitor, etc.

Wetmore v. Rymer, 169 U. S. 120, 121, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

Here I must caution you that if there be suspicion that the jurisdiction is imposed upon, that you should raise the issue by motion or answer, because if no issue is raised, and you trust to its development in the evidence, you place yourself at a disadvantage as to the proof, as the court will not infer a want of jurisdiction unless it affirmatively appears *in the legitimate evidence taken on the substantial issues in the case*.

To illustrate: If you have no motion or answer raising the issue, the mere fact that you have asked questions as to citizenship in your examinations, the responses to such questions, not being on any issue in the case, would not be considered, as it would not be legitimate evidence taken on a substantial issue; but if you plead it, all the evidence remotely tending to prove the issue made will be considered.

See Lindsay-Bitton Live Stock Co. v. Justice, 111 C. C. A. 525, 191 Fed. 163, as to effect of the general issue in cases at law. See act of March 3d, 1915, Judicial Code, sec. 274(c), providing that any suit brought on or removed to any district court of the United States where jurisdiction is based on diversity of citizenship and such diversity existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings, in both the district and appellate courts, so as to show diversity of citizenship, and the case shall proceed as if properly alleged in the original pleading, or in the petition for removal.

CHAPTER XXIII.

ISSUE AS TO DISTRICT OF SUIT OR VENUE.

What has been said as to the issue of jurisdiction, and the forms given by which it is presented, has had reference to fundamental conditions which could not be waived. I will now discuss the district of suit; how the issue is raised; and the forms applicable.

The requirement that a civil suit cannot be brought in any other district than that whereof the defendant is an inhabitant, except when the suit is based on a diversity of citizenship, then it may be brought in the district of the residence of either the plaintiff, or defendant, is only a personal exemption and must be pleaded in order to be available. *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 132, 38 L. ed. 98, 99, 14 Sup. Ct. Rep. 286 (see "Territorial Jurisdiction," p. 92; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 602, and authorities cited; *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 8. If the suit is not brought in the district of which defendant is an inhabitant, or in case of diversity of citizenship in the residence district of the plaintiff or defendant, the issue should be raised at once by motion or answer. As said, if apparent on the record a motion in the nature of a demurrer in the form heretofore given should be filed; and if not apparent, a motion in the nature of a plea should be filed, or the issue should be set up in the answer. The following form may be used:

A. B.	In the District Court of the United
v.	States for the District of
C. D., sitting at

And now comes the defendant (naming him) and says that at the commencement of this suit he was not, and is not now, an inhabitant of, nor does he reside in the.....district of, where this suit is brought (or if objection be to the division of the district use county, which is in the.....district of the State of....., and not in

the.....district of....., where this suit is brought (or that at the commencement of this suit he was and is now an inhabitant of and resident citizen of the county of.....in the.....division of thedistrict of Texas, that all process issuing to said.....county, of which he is an inhabitant and resident citizen, out of the District Court of the United States, is returnable to the.....division of said.....district of.....and not to the.....division of said district where the suit is brought).

Wherefore defendant pleads his privilege to be sued in the.....district of, of which he is a resident citizen and inhabitant (or to be sued in the.....division of the.....district of.....to whichdistrict of....., that all process issuing to said.....attached), and insists upon his exemption from suit in this court because he says the District Court of the United States for the.....district of (or the.....division of the District Court of the United States for the.....district of.....) has jurisdiction in the premises and not this court.

Prayer to be dismissed.

R. F.,
Solicitor, etc.

If the defendant is a corporation and sued in the State of its organization, and not in the district of its residence, then plea may be in this form:

Title and commencement as before.

And now comes the C. D. Company, the defendant in the above cause, and says that at the commencement of this suit and now it was and is an inhabitant of, and resided in.....county in the.....district of....., where its principal office, or headquarters, is situated, its corporate meetings held and its corporate business transacted, and is not an inhabitant, etc. (See form above given.)

Wherefore insisting on its exemption it says not this court, but the District Court of the United States for the.....district of....., has jurisdiction in the premises.

Prayer to be dismissed.

(See new rule 24.)

It has been the practice in some of the Federal districts, that where the defendant was an inhabitant of the district in which suit was brought, though not a resident citizen of the division of the district in which suit was brought, that the suit on motion would be transferred to the division of the district of which defendant was a resident citizen, and this was done on motion of the plaintiff in answer to a plea of privilege. This practice is now controlled by secs. 53 and 58 of the New

Code (Comp. Stat. 1913, secs. 1035, 1040), authorizing the transfer of the case to any other division of the same district.

The foregoing sections clearly confine the suit in personal actions to the subdivision having the county of defendant's residence in its jurisdiction, and distinctly indicates the court in which suit must be brought. It gives to each subdivision a distinct jurisdiction confining its process to the counties attached to it, unless there be two or more defendants living in different subdivisions. Of course this privilege may be waived, as stated in discussing territorial jurisdiction.

CHAPTER XXIV.

FEDERAL QUESTION.

We have been discussing the jurisdiction of the Federal courts as based upon the situation and citizenship of the parties, and I will now take up jurisdiction as based on the character of the subject-matter of the suit. The statute of 1888 provides that the circuit courts of the United States shall have jurisdiction of all cases at law or in equity arising *under the Constitution and laws of the United States*, or treaties made or to be made, if the amount or value in dispute exceeds two thousand dollars exclusive of interest and costs. While the Constitution of the United States left to Congress the power to declare the extent and distribute the jurisdiction among the Federal courts in this class of cases, *Nashville v. Cooper*, 6 Wall. 252, 18 L. ed. 852, yet from 1789 to 1875 the power was never exercised by Congress, except as to jurisdiction resting upon diversity of citizenship, and suits between aliens and citizens. The courts were organized for the benefits of non-residents and aliens, that they may escape the local influences of a State court. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 174.

The changed conditions created by the war between the States, and the strong tendency during that period to centralize power in the Federal government, inspired the judiciary act of 1875, in which the limit of constitutional power was reached by Congress in granting jurisdiction to the Federal courts.

It was deemed necessary that the supremacy of the laws and Constitution of the United States (U. S. Const. art. 6, cl. 2) must hereafter be enforced by the subordinate courts of its creation. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 171; *Osborn v. Bank of United States*, 9 Wheat. 818, 6 L. ed. 223; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. It sought a speedier way of construing and enforcing rights aris-

ing under the Constitution and laws of the United States than the old method through the State courts, and then by writ of error from the Supreme Court of the United States to the State court finally passing upon the Federal question; and then only when the State court had decided against the right claimed under laws or Constitution of the United States. U. S. Rev. Stat. sec. 709; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175.

Even the examination by the Supreme Court of the United States related only to the Federal question, and not to the issues of a non-Federal character. *Ibid.*; *Murdock v. Memphis*, 20 Wall. 590-626, 22 L. ed. 429-441; *Dower v. Richards*, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141. For if the judgment of the State court rested on grounds independent of the Federal question sufficient to sustain it, the writ of error would be refused. *Haley v. Breeze*, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Union Nat. Bank v. Louisville, N. A. & C. R. Co.* 163 U. S. 330, 41 L. ed. 178, 16 Sup. Ct. Rep. 1039; *Eustis v. Bolles*, 150 U. S. 361-366, 37 L. ed. 1111, 1112, 14 Sup. Ct. 131.

On March 3, 1875, Congress passed a jurisdictional and removal act, providing that all suits of a civil nature at common law or in equity, where the matter in dispute exclusive of costs exceeded the sum of five hundred dollars, and arising under the Constitution and laws of the United States, or treaties made or to be made, shall be heard in the circuit courts of the United States. *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 142, 37 L. ed. 1031, 14 Sup. Ct. Rep. 35. And thus for the first time this jurisdiction was conferred on the subordinate courts, and when the jurisdiction attached by reason of the Federal question, it extended to the whole case, with all the issues, Federal or non-Federal. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 177, and authorities. *Louisville Trust Co. v. Stone*, 46 C. C. A. 299, 107 Fed. 309; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454-456, 38 L. ed. 511, 512, 14 Sup. Ct. Rep. 654. With this brief view of the his-

tory of this jurisdiction the first question that presents itself is—

What is a Federal Question?

A case presents a Federal question when it becomes necessary to construe the Constitution, laws, or treaties of the United States in order to reach a correct decision of the material issues, or to decide as to the existence of some right, title, privilege, claim, or immunity asserted under the Federal Constitution and laws, or when plaintiff relies upon them, in whole or in part, for a recovery. *Dewey Min. Co. v. Miller*, 96 Fed. 2; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355, 356; *Starin v. New York*, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Ames v. Kansas*, 111 U. S. 462, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; *Lowry v. Chicago, B. & Q. R. Co.* 46 Fed. 83; *Minnesota v. Duluth & I. R. Co.* 87 Fed. 497; *Cooke v. Avery*, 147 U. S. 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 181; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *United States v. Old Settlers*, 148 U. S. 468, 37 L. ed. 524, 13 Sup. Ct. Rep. 650; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. The Constitution, laws, or treaties must be directly involved. *Ibid.*; *Carson v. Dunham*, 121 U. S. 421, 426, 30 L. ed. 992, 993, 7 Sup. Ct. Rep. 1030; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274-278.

It may be stated in another form, thus: The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the Constitution or laws, or sustained by a contrary construction. *Cooke v. Avery*, 147 U. S. 384, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Little York Gold-Washing & Water Co. v. Keyes*, *supra*; *New Orleans v. Benjamin*, 153 U. S. 411-424, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Farson v. Chicago*, 138 Fed. 186; *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38

L. ed. 513, 14 Sup. Ct. Rep. 654; *Starin v. New York*, supra; *Gibbs v. Crandall*, 120 U. S. 106, 30 L. ed. 590, 7 Sup. Ct. Rep. 497; *Shreveport v. Cole*, 129 U. S. 41, 32 L. ed. 591, 9 Sup. Ct. Rep. 210. It must really and substantially involve a controversy, the determination of which depends on the construction of the Federal law. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 174; *California Oil & Gas Co. & v. Miller*, 96 Fed. 12; *New Orleans v. Benjamin*, 153 U. S. 424, 38 L. ed. 769, 14 Sup. Ct. Rep. 905; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 196; *Bridge Proprs. v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Hamblin v. Western Land Co.* supra; *Carson v. Dunham*, 121 U. S. 426, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030. It must be a question of *law* as stated by the plaintiff in his complaint. *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 193; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626; *California Oil & Gas Co. v. Miller*, supra; not an issue of fact. *Ibid.* *Fitzgerald v. Missouri P. Co.* 45 Fed. 812.

And it may not only be a demand for something conferred by the Federal law (*Ibid.*; *Cohen v. Virginia and Tennessee v. Davis*, supra), but it may be a right, claim, defense, or protection, in whole or in part, growing out of the Federal legislation or constitutional provisions. *Sowles v. Witters*, 43 Fed. 700; *Nashville, C. & St. L. R. Co. v. Taylor*, 96 Fed. 178; *Minnesota v. Duluth & I. R. Co.* supra; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 357; *Cooke v. Avery and Starin v. New York*, supra; *Bock v. Perkins*, 139 U. S. 630, 35 L. ed. 315, 11 Sup. Ct. Rep. 677; *Frank v. Leopold & F. Co.* 169 Fed. 923; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96. Thus it is seen that the Federal question arises not only when the claim is based on Federal law, but also when it appears that the right of recovery may be defeated by a construction which may fairly be contended for. *Ibid.*

Judge Shiras, in his *Equity Practice*, page 17, says the jurisdiction in the phrase, "Cases arising under the Constitution, laws and treaties made," etc., is divided into two classes.

First. Where the cause of action springs directly from some provision of the Federal laws, as when the right claimed is directly given by Federal law, or where the cause of action arises out of some act of a Federal officer, based on Federal

law, as in cases of United States marshals. This is designated as jurisdiction direct and primary.

Second. When causes of action are based on or supported by the laws of a State thought to be in conflict with some right, duty, power, or franchise created or conferred by the Constitution of the United States, or its laws and treaties. This may be designated as derivative, or secondary, jurisdiction.

Direct and Primary.

Under this first head, suits by and against officers of the Federal government must fall under the control of the Federal courts when the acts complained of were done in their official capacity, and must necessarily be suits arising under the laws of the United States. *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Feibelman v. Packard*, 109 U. S. 424, 27 L. ed. 985, 3 Sup. Ct. Rep. 289; *Backrack v. Norton*, 132 U. S. 338, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; *Sonnenheil v. Christian Moerlin Brewing Co.* 172 U. S. 404, 43 L. ed. 494, 19 Sup. Ct. Rep. 233; *Bock v. Perkins*, supra; *Wood v. Drake*, 70 Fed. 881. Thus in 70 Fed. 881, supra, it was held that an action for damages for false imprisonment against a United States marshal acting under process from the Federal courts was within the Federal jurisdiction and could be removed, although the complaint is drawn to conceal the official character of the officer. This case, however, was subsequently modified, as will be seen hereafter.

An action against Federal officers as such, growing out of acts in executing Federal process, is within the jurisdiction of the Federal courts, regardless of citizenship or the absence of any disputed question of Federal law. *Ibid.*; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Bock v. Perkins and Wood v. Drake*, supra; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; *Guarantee Co. v. Hanway*, 44 C. C. A. 312, 104 Fed. 371; *Grant v. Spokane Nat. Bank*, 47 Fed. 673; *Jewett v. Whitcomb*, 69 Fed. 417; *Hurst v. Cobb*, 61 Fed. 2.

The rule has thus been laid down, and belongs to a line of Federal cases that hold all actions which bring into question the acts of officials or corporations created by, or representing.

the national government, are cases arising under the Constitution and laws of the United States. *Texas & P. R. Co. v. Cox*, 145 U. S. 602, 36 L. ed. 832, 12 Sup. Ct. Rep. 905; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 80; *Bailey v. Mosher*, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 491; *National Bank v. Wade*, 84 Fed. 12. As said, the national government must be permitted to exercise its powers in the States through its own appointed agencies, and national courts must be the arbiters as to the lawfulness of the acts of its agents.

In *McKee v. Brooks*, 64 Tex. 255, the supreme court of the State says that to determine the liability of a United States marshal sued upon his bond for a trespass committed while acting in his official capacity, resort must be had to section 783 of the United States Revised Statutes, Comp. Stat. 1913, sec. 1307; and as to the extent of the damage to be allowed, section 784 of the United States Revised Statutes is applicable, and that a suit which cannot be prosecuted and determined without resort to the acts of Congress becomes a suit arising under the laws of the United States, and therefore within Federal jurisdiction, following *Feibelman v. Packard*, supra, before cited, *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Files v. Davis*, 118 Fed. 465, 466.

There is no question that the rule as above given is the true rule when the Federal officer is sued as such, or when suit is upon his bond given by Federal law for a proper performance of duty, but the question arises, Suppose the Federal officer is not sued as such, nor is he sued upon his bond, but as a simple trespasser in seizing property under Federal process, then what is the rule?

In *McKee v. Coffin*, 66 Tex. 307, 1 S. W. 276, a United States marshal was sued to recover the value of certain property alleged to have been illegally seized and converted by him. The United States marshal justified the seizure under Federal process, and sought to remove the case into the Federal court. The suit was not upon the bond of the marshal, nor was he sued as United States marshal. The court denied the right of removal on the ground that he was United States marshal only shown by his own pleading. The same condition of case arose in *Mayo v. Dockery*, 108

Fed. 898, and the issue of jurisdiction arose on the motion to remand to the State court, and the case was remanded back to the State court. The court laid down as the basis of its action, that since the jurisdictional act of 1888 the petition of plaintiff must set forth the fact that the defendant is sued as United States marshal; that the rule prior to the act of 1888 as illustrated in *Bock v. Perkins*, *supra*, has been changed; and that now the Federal question must appear in the petition (*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654), or the Federal court cannot take jurisdiction, and that the defense that an act was performed in an official capacity could not give the Federal court jurisdiction (*Walker v. Collins*, 167 U. S. 58, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Postal Teleg. Cable Co. v. United States* [*Postal Teleg. Cable Co. v. Alabama*] 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192).

The rule then may be stated, that if the petition shows the defendant is sued as United States marshal, or that the act complained of was done in his official capacity, the case would present a Federal question and within the jurisdiction of the Federal courts, without reference to citizenship of parties (*Sonnenthal v. Christian Moerlin Brewing Co.* 172 U. S. 401-405, 43 L. ed. 492-494, 19 Sup. Ct. Rep. 233; *Mayo v. Dockery*, 108 Fed. 899; *Frank v. Leopold & F. Co.* 169 Fed. 922), but if the defendant is sued as an individual, without reference in the petition to his official position, then the case cannot be removed to the Federal courts. *People's United States Bank v. Goodwin*, 160 Fed. 728; *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; *Walker v. Collins* and *Chappell v. Waterworth*, *supra*; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 494, 495, 40 L. ed. 1049, 1050, 16 Sup. Ct. Rep. 869; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Filhiol v. Torney*, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; *Joy v. St. Louis*, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478; *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560.

These cases clearly modify the broad statements in *Wood v. Drake*, *supra*, and is due to the difference between the juris

dictional acts of 1875 and 1888 as shown in *Tennessee v. Union & Planters' Bank*, *supra*; *People's United States Bank v. Goodwin*, 160 Fed. 729. While the undoubted rule as stated in the foregoing cases requires the Federal question to appear in the plaintiff's statement of his own claim, and if it does not so appear the want cannot be supplied in the subsequent pleadings or petition for removal, yet we have a line of cases that seek to evade this rule of Federal jurisdiction, where the ingenuity of counsel has suppressed the facts that would have given jurisdiction. *Wood v. Drake*, 70 Fed. 882. But as said in *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873, the plaintiff has a right to set up his case as he pleases, and is not required to state matters not essential to his cause of action, and which would more properly come from the other side. As long as he sets up his claim in legal and logical form, and specifically states his cause of action resting upon the common law of the land, the courts have no right to go behind it to uncover motive. *People's United States Bank v. Goodwin*, 160 Fed. 730; *Washington v. Island Lime Co.* 117 Fed. 778; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 248, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 495, 496, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206-216, 50 L. ed. 441-446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147.

By section 643 of the United States Revised Statutes, it is provided that any civil or criminal suit commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, shall be removed to the Federal court. This act is held to cover United States marshals, deputies, and assistants engaged in the service of process for arrest, or otherwise within the purview of the law. *Davis v. South Carolina*, 107 U. S. 600, 27 L. ed. 575, 2 Sup. Ct. Rep. 636; *Tennessee v. Union & Planters' Bank*, 152 U. S. 463, 38 L. ed. 514, 14 Sup. Ct. Rep. 654. New Code, sec. 33 (Comp. Stat. 1913, sec. 1015).

Corporations Chartered by Congress.

In the case of *Texas & P. R. Co. v. Cody*, 166 U. S. 609, 41 L. ed. 1134, 17 Sup. Ct. Rep. 703, 1 Am. Neg. Rep. 763, the Supreme Court of the United States held that the Texas & Pacific Railway Company, operating under a Federal charter, may remove all suits begun in the State courts, involving, of course, the jurisdictional amounts, to the Federal courts for trial. Chief Justice Fuller bases this great privilege upon the fact that the breath of life having been breathed into the corporation by Federal lungs, that it moves, acts, and has its being in that source, and necessarily all of its faculties and capacities are derived from the national fiat; consequently all of its acts, good, bad and indifferent, though wholly within the State of Texas, could only have been inspired by its national life. So, then, suits of any nature against or by this corporation arise under the laws of the United States, whether it be for damages for personal injuries, or the failure to transport a car of cattle shipped from one point in the State to another. The Chief Justice says that it does not even require an allegation of its Federal charter nor a hint of its national life, nor is it necessary to show upon what Federal law its liability for injuries to men, or cattle, or nondelivery of freight rests. Its common-law and statutory liability for carriage with the State is overshadowed by its congressional charter.

Congress by an act of January 28, 1915, being an act to amend an act entitled "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3d, 1911, section 5, has provided that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress."

National Banks.

In chapter 14, I discussed the citizenship of National banks as affecting jurisdiction, and we saw that these Federal corporations were placed on the same footing with the State corporations, except in cases where Federal officers were winding up the affairs of the institution. Act 1888, sec. 4 (see Appendix);

Speckart v. German Nat. Bank, 85 Fed. 12; same case, 38 C. C. A. 682, 98 Fed. 153; Guarantee Co. of N. A. v. Hanway, 44 C. C. A. 312, 104 Fed. 372. In cases, however, where a Federal question is involved, they may enter the Federal courts without reference to citizenship, if the proper amount is involved. The Federal charter is not the basis of the right, but in cases where a Federal question is involved they may enter the Federal courts without reference to citizenship if the proper amount is involved. The Federal question must appear in the statement of the case (Larabee v. Dolley, 175 Fed. 367-382), and it does appear whenever the controversy touches their rights under the law of their creation. Ibid., 384; Huff v. Union Nat. Bank, 173 Fed. 336.

So all proceedings by any national bank association to enjoin the comptroller of the currency under the provisions of any law relating to national banking associations shall be had in the district where such association is located. Chap. 4, sec. 49, Code (Comp. Stat. 1913, sec. 1031).

S. Eq.—10.

CHAPTER XXV.

FEDERAL QUESTIONS ARISING UNDER CONSTITUTIONAL PROVISIONS.

The most frequent and familiar illustrations of the Federal question arise under alleged conflicts of State legislation with section 10, article 1, and the provisions of the 14th Amendment to the Constitution of the United States. As where it is claimed that State legislation has impaired the obligation of a contract. *American Teleph. & Teleg. Co. v. Decatur*, 176 Fed. 133; *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Bacon v. Texas*, 163 U. S. 216, 41 L. ed. 136, 16 Sup. Ct. Rep. 1023; *Whitman College v. Berryman*, 156 Fed. 112-117; *Green v. Oemler*, 151 Fed. 936; *Larabee v. Dolley*, 175 Fed. 368; *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 391, 392, 5 A. & E. Ann. Cas. 314; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736; *Wilson v. Brochon*, 95 Fed. 82; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 563, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653; *McCullough v. Virginia*, 172 U. S. 116, 43 L. ed. 387, 19 Sup. Ct. Rep. 134; *Louisiana v. Pillsbury*, 105 U. S. 294, 26 L. ed. 1095; *Underground R. Co. v. New York*, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; *National Mut. Bldg. & L. Asso. v. Braham*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; *Brawner v. Irvin*, 169 Fed. 964; *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500-508. And such effect may arise from a by-law or ordinance of a municipal corporation. *Missouri K. & I. R. Co. v. Olafhe*, 156 Fed. 632, and authorities cited; *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Mercantile Trust & D. Co. v. Collins Park &*

Belt R. Co. 99 Fed. 812; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Bacon v. Texas, *supra*; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Walla Walla v. Walla Walla Water Co. 172 U. S. 2, 43 L. ed. 342, 19 Sup. Ct. Rep. 77; People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520; Defiance Water Co. v. Defiance, 191 U. S. 191, 48 L. ed. 143, 24 Sup. Ct. Rep. 63; American Teleph. & Teleg. Co. v. Decatur, *supra*, and cases cited; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Southern Bell Teleph. & Teleg. Co. v. Richmond, 44 C. C. A. 147, 103 Fed. 31; Savannah v. Holst, 65 C. C. A. 449, 132 Fed. 901; Iron Mountain Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 113; Kansas City Gas Co. v. Kansas City, 198 Fed. 500; Hagerla v. Mississippi River Power Co. 202 Fed. 784; American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 Ann. Cas. 978; Seattle, R. & S. R. Co. v. Seattle, 190 Fed. 75; American Teleph. & Teleg. Co. v. New Decatur, 176 Fed. 133.

Privileges and Immunities.

Again, when one has been deprived by such legislation of certain privileges and immunities of citizenship. United States v. Moore, 129 Fed. 632; Cooke v. Avery, 147 U. S. 384, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; Knight v. Shelton, 134 Fed. 426; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; First State Bank v. Shallenberger, 172 Fed. 1000; Slaughter-House Cases, 16 Wall. 36, 116, 122, 21 L. ed. 394, 421, 423; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Swafford v. Templeton, 108 Fed. 310, S. C. 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Skinner v. Garnett Gold Min. Co. 96 Fed. 735. It will be seen in these cases that the protection thus committed to the Federal government is the right or privilege granted in terms by some provision of the Constitution, or appropriate to

the enjoyment of a right, etc., conferred on the citizen by the Constitution. A corporation is not a citizen within the meaning of this constitutional clause. *Cumberland Gaslight Co. v. West Virginia & M. Gas Co.* 110 C. C. A. 383, 188 Fed. 586.

Due Process of Law.

Or of some right or interest without due process of law. *Central R. Co. v. Macon*, 110 Fed. 865; *San Joaquin & K. River, Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 516; *Consolidated Water Co. v. San Diego*, 35 C. C. A. 631, 93 Fed. 849; *Ex parte Young*, 209 U. S. 144, 52 L. ed. 722, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 728; *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; *United States v. New York, N. H. & H. R. Co.* 165 Fed. 742-746; *Savannah v. Holst*, *supra*; *Ozark-Bell Teleph. Co. v. Springfield*, 140 Fed. 666; *Louisville v. Cumberland Teleph. & Teleg. Co.* 84 C. C. A. 151, 155 Fed. 725, 12 A. & E. Ann. Cas. 500; *Chicago R. Co. v. Chicago*, 142 Fed. 845; *Lochner v. New York*, 198 U. S. 63, 49 L. ed. 944, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; *White v. Tacoma*, 109 Fed. 32; *Southern R. Co. v. North Carolina Corp. Commission*, 97 Fed. 513; *Missouri P. R. Co. v. Omaha*, 117 C. C. A. 12, 197 Fed. 516; *Wilmington City R. Co. v. Taylor*, 198 Fed. 160; *Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 178; *St. Louis Southwestern R. Co. v. Griffin*, — *Tex. Civ. App.* —, 154 S. W. 583; *Illinois Trust & Sav. Bank v. Des Moines*, 224 Fed. 620.

Equal Protection of the Laws.

Or of some deprivation of the equal protection of the laws. *Ibid.*; *Ex parte Young*, *supra*; *United States v. New York, N. H. & H. R. Co.* 165 Fed. 746; *Cincinnati Street R. Co. v. Snell*, 193 U. S. 30, 37, 48 L. ed. 604, 607, 24 Sup. Ct. Rep. 319; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 629; *Anglo American Provision Co. v. Davis*

Provision Co. 105 Fed. 536; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 169; Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 102, 46 L. ed. 92, 106, 22 Sup. Ct. Rep. 30; Raymond v. Chicago Union Traction Co. 207 U. S. 36, 52 L. ed. 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Williamson v. Liverpool L. & G. Ins. Co. 72 C. C. A. 542, 141 Fed. 54, 5 A. & E. Ann. Cas. 402. Again we have innumerable cases in which the railroads of the land have sought Federal protection from alleged unreasonable rates, upon the ground that they were being deprived of their property without "due process of law," and thus deprived of "the equal protection of laws." Ex parte Young, *supra*; Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Poor v. Iowa C. R. Co. 155 Fed. 226, 227; Perkins v. Northern P. R. Co. 155 Fed. 445, and cases cited therein, illustrate the application of these clauses of the Federal Constitution creating the "Federal question." See Washington, P. & C. R. Co. v. Magruder, 198 Fed. 218; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Risley v. Utica, 168 Fed. 737; St. Louis Southwestern R. Co. v. Griffin, — Tex. Civ. App. —, 154 S. W. 583; Central Trust Co. v. Lueders, 137 C. C. A. 387, 21 Fed. 829.

The provisions of the 14th Amendment in protecting rights of property and privileges and immunities of citizenship has been applied not only to annual adverse legislation, but to executive and judicial acts, as well, affecting individual rights as stated. Raymond v. Chicago Union Traction Co. 207 U. S. 20-36, 52 L. ed. 78-87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; United States v. Cruikshank, 92 U. S. 542-545, 23 L. ed. 588-590; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 184, 185; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

We see, then, the 14th Amendment is directed against a State and its agencies, and not individuals. Chicago, R. I. & P. R. Co. v. Ludwig, 156 Fed. 152; Western U. Teleg. Co. v. Andrews, 154 Fed. 95; Morrill v. American Reserve Bond Co. 151 Fed. 305; St. Louis & S. F. R. Co. v. Hadley, 161 Fed. 421; Lindsley v. Natural Carbonic Gas Co. 162 Fed. 954;

Western U. Teleg. Co. v. Julian, 169 Fed. 166; Marten v. Holbrook, 157 Fed. 716; Central R. Co. v. McLendon, 157 Fed. 961; Central R. Co. v. Railroad Commission, 161 Fed. 925; Southern R. Co. v. McNeill, 155 Fed. 757.

So a Federal question may arise when right of recovery rests upon unconstitutionality of an act of Congress. Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493.

I have thus set forth the prolific source of Federal jurisdiction. It would serve no useful purpose in this work to review the cases, but they have been selected to illustrate the various phases and conditions under which the Federal courts have given or refused relief under the provisions of the Constitution, as above stated.

It is apparent that "due process of law" and "the equal protection of the laws" is the familiar refuge of those whose rights are alleged to have been impaired by laws from whatever source they emanate (Bacon v. Texas, *supra*), and that the word "law" as used in this Amendment means both the general law of the land, which protects life, liberty, property, and immunities, and the laws of procedure. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; United States v. New York, N. H. & H. R. Co. *supra*.

CHAPTER XXVI.

SECTION 709, U. S. REV. STAT. APPLIED.

Where the Federal Question must Appear.

Whether a case presents a Federal question or not must be determined from the face of the bill. That is, it must appear in plaintiff's statement of his own claim, not by mere averment. *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *New Orleans v. New Orleans Water Works Co.* 142 U. S. 79-87, 35 L. ed. 943-946, 12 Sup. Ct. Rep. 142; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 662, 42 L. ed. 316, 17 Sup. Ct. Rep. 925; nor from inference or argument. *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051. But it must appear in the plain logical statement of plaintiff's case. *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 244, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867; *Louisville v. Cumberland Teleph. & Teleg. Co.* 155 Fed. 725-730, 12 A. & E. Ann. Cas. 550. *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66-78, 44 L. ed. 673-680, 20 Sup. Ct. Rep. 545; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 495, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 872; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 341; *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 877; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274; *S. C.* 188 U. S. 644, 47 L. ed. 633, 23 Sup.

Ct. Rep. 434; *Filhiol v. Torney*, 119 Fed. 976; *Joy v. St. Louis*, 122 Fed. 524; *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 632.

These conditions were true under the act of 1875 in suits originally brought in the circuit court (*Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173); but under this act, in removals from State to Federal courts, the Federal question could be presented in the plea, answer, or petition for removal. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654, and authorities cited; *Mayo v. Dockery*, 108 Fed. 898. But this is not true under the act of 1888. *Ibid.* The authorities above cited show that the Federal question must appear in the bill, and not in any subsequent pleading. *Wise v. Nixon*, 78 Fed. 204; *Tennessee v. Union & Planters' Bank* and *Chappell v. Waterworth*, *supra*; *Postal Teleg. Cable Co. v. United States* (*Postal Teleg. Cable Co. v. Alabama*) 155 U. S. 482, 39 L. ed. 231, 13 Sup. Ct. Rep. 192; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

Remedies if Federal Question Not Raised in Bill.

This fact, however, that the Federal question cannot be raised by the answer or subsequent pleading to give Federal jurisdiction, does not deprive the defendant of the right of having the question finally passed upon by the Supreme Court of the United States. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396. If you set up the Federal question in the answer in the State court, you place yourself in a position to appeal from the highest State tribunal having jurisdiction to finally pass upon the issue, which in some State may be the supreme court or one of the lower courts, to the Supreme Court of the United States, provided the decision of the State court of last resort has been against the right claimed under the Federal Constitution or laws. U. S. Rev. Stat. sec. 709; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Giles v. Teasley*, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359; *Chicago, B.*

& Q. R. Co. v. Chicago, 166 U. S. 232, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Meyer v. Richmond, 172 U. S. 92, 43 L. ed. 377, 19 Sup. Ct. Rep. 106; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 68, 43 L. ed. 368, 19 Sup. Ct. Rep. 97; Harrison v. Morton, 171 U. S. 47, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; Eustis v. Bolles, 150 U. S. 366, 37 L. ed. 1112, 14 Sup. Ct. Rep. 131.

In the event the Federal issue is declared against you by the judgment of the State court, and the judgment of the State court does not rest on any other ground than is involved in the Federal question, then you may sue out a writ of error from the Supreme Court of the United States to the State court of final resort deciding *against* the Federal question, and have the question determined by the Supreme Court of the United States. McNulta v. Lockridge, 141 U. S. 331, 35 L. ed. 799, 12 Sup. Ct. Rep. 11; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Dewey v. Des Moines, 173 U. S. 199, 43 L. ed. 666, 19 Sup. Ct. Rep. 379. But if the judgment of the State court rests wholly on grounds of a non-Federal character, the writ of error will not be granted, though there be a Federal question in issue. Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Delaware City S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 637, 35 L. ed. 1142, 12 Sup. Ct. Rep. 290; Haley v. Breeze, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; Giles v. Teasley, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359; Sauer v. New York, 206 U. S. 536-546, 51 L. ed. 1176-1181, 27 Sup. Ct. Rep. 686; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Seeberger v. McCormick, 175 U. S. 280, 44 L. ed. 163, 20 Sup. Ct. Rep. 128; Bacon v. Texas, 163 U. S. 227, 41 L. ed. 139, 16 Sup. Ct. Rep. 1023; Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; Nashville, C. & St. L. R. Co. v. Taylor, *supra*.

Section 709, United States Revised Statutes.

This power of revision of the decision of the State courts by the Supreme Federal Court is given by the United States

Revised Statutes, sec. 709, which provides for the writ of error to the State court of last resort:—

First. When the State court decides against the right claimed under the Federal law, or the validity of a treaty, or an authority exercised under the United States, when drawn in question in the cause so decided.

Second. When there is drawn in question the validity of a statute, or an authority exercised under a State, on the ground of repugnancy to the Constitution, treaty, or laws of the United States, and the decision of the State court is in favor of their validity.

Third. When any right, title, privilege, or immunity is claimed under the Constitution, laws, or treaties of the United States, or *commission* held, or authority exercised under the United States, and the decision of the State court is against the right, title, privilege, or immunity set up or claimed by either party, under the Constitution, laws, treaties, commission, or authority. U. S. Rev. Stat. sec. 709, is embodied in sec. 237 of the new Judicial Code (Comp. Stat. 1913, sec. 1214).

This statute is much more comprehensive than the sections of the judiciary act of 1875 and 1888, giving to the circuit courts of the United States jurisdiction when the Constitution, laws, and treaties of the United States are to be construed in determining the material issues in a case, in that it gives a further right to Federal supervision, as when the cause of action arises under a *commission* held or authority exercised under the United States (*Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Carson v. Dunham*, 121 U. S. 428, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 307, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *McGuire v. Massachusetts*, 3 Wall. 385, 18 L. ed. 165; *Cooke v. Avery*, 147 U. S. 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 14, 15, 45 L. ed. 404, 21 Sup. Ct. Rep. 240; *Avery v. Popper*, 179 U. S. 309, 45 L. ed. 204, 21 Sup. Ct. Rep. 94), and creates a different mode in which a Federal question may arise (*Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175, 176; *McNulta v. Lockridge*, 141 U. S. 330, 331, 35 L. ed. 798, 799, 12 Sup. Ct. Rep. 11); as, where a suit is brought

in a State court on a Federal judgment obtained in another State, while such suit could not be removed to the United States circuit court, yet a writ of error would lie to the Supreme Court of the United States, if the State court of last resort should fail to give full effect to the authority exercised under the United States as shown by the judgment, because it comes within the letter of section 709. *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 641, 29 L. ed. 263, 5 Sup. Ct. Rep. 1104; *Carson v. Dunham*, 121 U. S. 428, 429, 30 L. ed. 994, 995, 7 Sup. St. Rep. 1030; *Avery v. Popper*, 179 U. S. 314, 45 L. ed. 206, 21 Sup. Ct. Rep. 94; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175.

So where a suit enforcing a property right acquired under a judgment of a Federal court, if the highest court of a State should fail to give effect to the authority exercised under the United States, as shown by the judgment and decrees of their courts, then its decision may be subjected to revision under section 709. *Ibid.*; *Huntington v. Attrill*, 146 U. S. 666, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

Thus we see there are issues presenting a Federal question, but only to be revised by the Supreme Court of the United States and not within the acts of 1875 and 1888, giving jurisdiction to the circuit courts of issues resting upon the existence of a Federal question.

To take advantage of this statute, you will see by the third clause that it must be specially set up and claimed by either party, that is, the right, title, or immunity claimed must be pleaded. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 476, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Dewey v. Des Moines*, 173 U. S. 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; *Eustis v. Bolles*, *supra*; See *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47. See *Meyer v. Richmond*, 172 U. S. 83, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Green Bay & M. Canal Co. v. Patten Paper Co.* *supra*; But where the validity of a statute or treaty of the United States is raised in any suit brought in a

State court, and the decision is against it, or where the validity of a State statute is drawn in question as being repugnant to the Constitution or laws of the United States, and the validity of the State statute is sustained, then if the Federal question appears in the record and was necessarily involved and decided, or if the case could not be decided without deciding the Federal question, then the fact that it was not specially set up does not present a review of the question in the Supreme Court of the United States. *Ibid.*; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 127, 48 L. ed. 376, 24 Sup. Ct. Rep. 221; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; *Chapman v. Goodnow* (*Chapman v. Crane*) 123 U. S. 548, 31 L. ed. 238, 8 Sup. Ct. Rep. 211; *Green Bay & M. Canal v. Patten Paper Co.* 172 U. S. 58-68, 43 L. ed. 364-368, 19 Sup. Ct. Rep. 97; *Harrison v. Morton*, *supra*; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 579, 28 L. ed. 1086, 5 Sup. Ct. Rep. 681; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 622, 42 L. ed. 881, 18 Sup. Ct. Rep. 488; *Millingar v. Hartupee*, 6 Wall. 262, 18 L. ed. 830.

No particular form of words is necessary to raise the Federal question, within the meaning of the clause of the section under consideration, yet there must be something in the case before the State court which at least would call its attention to the Federal question as one relied upon by the party claiming it, and then even if the court did not notice the question, but the effect of its decision was a denial of the right claimed, it would be sufficient (*Dewey v. Des Moines*, *supra*; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581); but it is not enough that there be somewhere hidden away in the record a question which if raised would be of a Federal nature. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904 (see *Appeal from State to Supreme Court of the United States*, *infra*, chapter 113).

CHAPTER XXVII.

HOW THE FEDERAL QUESTION MUST APPEAR.

We have discussed where the Federal question must appear, and I now propose to briefly state how it must appear.

In *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2, it was held that if, from the plaintiff's bill or petition, it appears that in any aspect the case may assume the right of recovery may depend on the construction of a Federal statute, and such right is not a mere colorable claim, but rests on a reasonable foundation, then a Federal question is involved adequate to confer jurisdiction, though the case may be finally decided on other grounds. *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 632; *Arkansas v. Choctaw & M. R. Co.* 134 Fed. 107; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; *Huff v. Union Nat. Bank*, 173 Fed. 336; *Files v. Davis*, 118 Fed. 469, 470; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223. Whether the claim that a Federal question exists is well founded, when tried on its merits, does not affect jurisdiction, if as a matter of fact the statement in the case presented the Federal question as a real substantial issue. The court must take jurisdiction to determine whether the claim is valid or not, and having jurisdiction may decide all the issues (*Ibid.*; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168-178; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 45, 45 L. ed. 417, 21 Sup. Ct. Rep. 256), though it should appear at the trial there was no Federal question. *Ibid.*; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656.

But it is not to be understood that a mere reference in a bill to a Federal statute, and setting up a mere colorable claim thereunder, or the fact that it may be found necessary to consult or refer to some Federal statute to ascertain the meaning

of a contract, sets up a Federal question. *Illinois C. R. Co. v. Chicago*, 176 U. S. 656, 44 L. ed. 626, 20 Sup. Ct. Rep. 509; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. St. Rep. 633; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Swafford v. Templeton*, 185 U. S. 487-493, 46 L. ed. 1005-1008, 22 Sup. Ct. Rep. 783; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 203, 24 L. ed. 658; *Wise v. Nixon*, 78 Fed. 203; *California Oil & Gas. Co. v. Miller*, 96 Fed. 18; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *St. Paul, M. & M. R. Co. v. St Paul & N. P. R. Co.* supra; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 452; *Devine v. Los Angeles*, 202 U. S. 313-332, 50 L. ed. 1046-1053, 26 Sup. Ct. Rep. 652.

To illustrate: Title to land may be derived from the Federal government, yet unless a construction of the granting power was necessary to decide a material issue in the case there would be no Federal question. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra; *California Oil & Gas Co. v. Miller*, 96 Fed. 17. Thus in a sale on execution issuing out of a Federal court, if only the title of the defendant, when the execution was levied, was assailed, there would be no Federal question, but otherwise if the validity of the writ is assailed. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505-507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; *Avery v. Popper*, 179 U. S. 314, 45 L. ed. 206, 21 Sup. Ct. Rep. 94; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Florida, C. & P. R. Co. v. Bell*, 176 U. S. 321-328, 44 L. ed. 486-490, 20 Sup. Ct. Rep. 399; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 195-196. See *Florida, C. & P. R. Co. v. Bell*, 31 C. C. A. 9, 59 U. S. App. 189, 87 Fed. 369. Or the validity of the lien of the judgment is in issue. *Cooke v. Avery*, 147 U. S. 375-390, 37 L. ed. 209-214, 13 Sup. Ct. Rep. 340. Or the title acquired under the lien. *Pierce v. Mollikien*, 78 Fed. 196.

Again, where plaintiff claims lands from a grant by Congress, which is not denied, but the defense is that the lands in dispute are not covered by the grant, there is no Federal

question, but otherwise if the title is put in issue. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra; *Southern P. R. Co. v. Whittaker*, 47 Fed. 529; *Murray v. Bluebird Min. Co.* 45 Fed. 385. See *Butler v. Shafer*, 67 Fed. 161. So where there are conflicting claims to entries of public lands a Federal question is raised. *Linkswiler v. Schneider*, 95 Fed. 203. Or where there is a conflict of riparian rights in lands granted by the United States. *King v. St. Louis*, 98 Fed. 641; *Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 429-430. See *McGilvra v. Ross*, 90 C. C. A. 398, 164 Fed. 604. So conflicting claims to mining lands granted by the Federal government (*Cates v. Producers & C. Oil Co.* 96 Fed. 8), but where there is no dispute as to the meaning of the Federal law, but only as to which claim was first made, there is no Federal question. *California Oil & Gas. Co. v. Miller*, supra; *Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 114; *Hooker v. Los Angeles*, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395. See *Devine v. Los Angeles*, 202 U. S. 338, 50 L. ed. 1055, 26 Sup. Ct. Rep. 652; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 29 C. C. A. 462, 57 U. S. App. 13, 85 Fed. 867; *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.* 84 Fed. 1; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 683, 37 L. ed. 611, 13 Sup. Ct. Rep. 771; *Budzisz v. Illinois Steel Co.* 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503; *Filhiol v. Torney*, 119 Fed. 974; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *McMillen v. Ferrun Min. Co.* 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

The mere fact that in the progress of a cause it becomes necessary to construe the Federal Constitution or laws does not make a Federal question; it must appear that the recovery sought is based on the construction to be given, and it is the substantial issue. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Hanford v. Davies*, 163 U. S. 273-279, 41 L. ed. 157-159, 16 Sup. Ct. Rep. 1051; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199,

16 Sup. Ct. Rep. 34; *Hamblin v. Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *Wise v. Nixon*, supra; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355, 356.

Cases involving the infringement of patents or copyrights raises a Federal question, but suits merely to recover the price if sold or the right to manufacture and sell the patented or copyrighted articles under a contract, and not involving the validity of the patent or copyright, does not raise a Federal question. *St. Paul Plough Works v. Starling*, 127 U. S. 378, 32 L. ed. 252, 8 Sup. Ct. Rep. 1327; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 260, 42 L. ed. 460, 18 Sup. Ct. Rep. 62; *Hartell v. Tilghman*, 99 U. S. 555, 25 L. ed. 360; *Marsh v. Nichols, S. & Co.* 140 U. S. 356, 35 L. ed. 417, 11 Sup. Ct. Rep. 798; *Albright v. Teas*, 106 U. S. 617, 27 L. ed. 297, 1 Sup. Ct. Rep. 550; *Densmore v. Three Rivers Mfg. Co.* 38 Fed. 750; *Montgomery Palace Stock-Car Co. v. Street Stable-Car Line*, 43 Fed. 331; *Silver v. Holt*, 84 Fed. 811. So with reference to national banks, a suit against directors for money loaned, alleged in a petition, raises no Federal question. *Bailey v. Mosher*, 74 Fed. 15, S. C. 95 Fed. 224, 46 C. C. A. 471, 107 Fed. 561. See *Gates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; *Bailey v. Mosher*, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 488. Nor title to national bank stock. *Leyson v. Davis*, 170 U. S. 40, 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 500.

But a suit on a bond of a cashier of a national bank is a Federal question. *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 80. So a suit by a receiver of a national bank against stockholders for stock assessment, does raise a Federal question. *Hayden v. Brown*, 94 Fed. 15. And such receiver may sue without reference to amount or citizenship. *Brown v. Smith*, 88 Fed. 565. A suit against a Federal receiver for acts of a former receiver does not raise a Federal question, *McNulta v. Lockridge*, 141 U. S. 329, 35 L. ed. 797, 12 Sup. Ct. Rep. 11, but suing a receiver without permission where required does raise a Federal question. *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 736, 737.

When full faith and credit are not given to the judgment of a sister State a Federal question is involved. U. S. Const

art. 4, § 1; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 334, 40 L. ed. 989, 16 Sup. Ct. Rep. 810; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; *Huntington v. Attrill*, 146 U. S. 683, 684, 36 L. ed. 1133, 1134, 13 Sup. Ct. Rep. 224; *Anglo-American Provision Co. v. Davis Provision Co.* 105 Fed. 536; *Carpenter v. Strange*, 141 U. S. 103, 35 L. ed. 646, 11 Sup. Ct. Rep. 960.

The construction of a State statute of limitation does not raise a Federal question. *Ludeling v. Chaffe*, 143 U. S. 305, 36 L. ed. 314, 12 Sup. Ct. Rep. 439; *Dupree v. Mansur*, 214 U. S. 161, 53 L. ed. 950, 29 Sup. Ct. Rep. 548; *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. Rep. 842. Nor the refusal of a trial by jury. *Iowa C. R. Co. v. Iowa*, 160 U. S. 393-394, 40 L. ed. 469, 16 Sup. Ct. Rep. 344. Nor whether a party acquired a right under a State land law before its withdrawal. *Bacon v. Texas*, 163 U. S. 209-219, 41 L. ed. 133-137, 16 Sup. Ct. Rep. 1023. Nor whether an ordinance of a city conforms to its charter. *Savannah v. Holst*, 65 C. C. A. 449, 132 Fed. 901-903; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

The Federal right claimed to raise a Federal question must be that of the plaintiff, and not a third person. *Ludeling v. Chaffe*, *supra*; *Giles v. Little*, 134 U. S. 645-649, 33 L. ed. 1062, 1063, 10 Sup. Ct. Rep. 623; *McCandless v. Pratt*, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 144. And in alleging the Federal question it is not necessary that the bill must show the particular clause of the Constitution, but the allegation must be positive, not argumentative. *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 148, 153, 154; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051. But if the whole theory of the case shows an impairment by statute of a contract, the Federal question may appear without mentioning the Constitution.

Receivers.

Receivers appointed by Federal courts have heretofore been
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held to have been fully within the class of Federal officers necessarily exercising powers derived from Federal authority, and could sue or be sued in the Federal courts by virtue of the Federal appointment. *Thompkins v. MacLeod*, 96 Fed. 927; *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49, note; *Gilmore v. Herrick*, 93 Fed. 525; *Carpenter v. Northern P. R. Co.* 75 Fed. 850; *Gableman v. Peoria, D. & E. R. Co.* 101 Fed. 6, 7; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 918, 78 Fed. 387. But it has now been fully determined that the appointment of a receiver by a Federal judge does not by virtue of his appointment raise a Federal question, so that if sued in a State court the case would be removable to a Federal court on the ground of a Federal question. *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171, S. C. 41 C. C. A. 160, 101 Fed. 6, 7; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Marrs v. Felton*, 102 Fed. 778; *Yarnell v. Felton*, 104 Fed. 163; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 384, 48 L. ed. 490, 24 Sup. Ct. Rep. 325; *Pepper v. Rogers*, 128 Fed. 988. See "Removal by Receivers." *Dale v. Smith*, 182 Fed. 360.

Prior to the act of 1888, section 3, a Federal receiver could not be sued out of the court appointing him, without special permission of the appointing court, but since said act a receiver may be sued in any court of competent jurisdiction, State or Federal, in respect to any act or transaction of the receiver in carrying on the business connected with the property held as receiver. *Ibid.* The act of 1888, section 3, is discussed hereafter under "Jurisdictional Amount" in suits by and against receivers, so I pass to another phase of the question. Section 3 of the act of 1888 is embodied in section 66 of the New Code (Comp. Stat. 1913, sec. 1048).

CHAPTER XXVIII.

ISSUE OF FEDERAL QUESTION—HOW RAISED.

Having shown what is a Federal question, where and how it must appear, and how alleged, and its effect in giving jurisdiction to the Federal courts,—first, by writ of error to the Supreme Court of the United States; second, by original jurisdiction of the circuit courts, and by removal from State courts,—let us now discuss the right of the plaintiff to obtain jurisdiction in the Federal courts, by anticipating in his bill the defense of a Federal question upon which defendant will rest his case. *Cox v. Gilmer*, 88 Fed. 346; *Joy v. St. Louis*, 122 Fed. 524; *Filhiol v. Torney*, 119 Fed. 974; *Florida, C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Filhiol v. Torney*, 194 U. S. 356, 360, 48 L. ed. 1014, 1017, 24 Sup. Ct. Rep. 698; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 639, 47 L. ed. 631, 23 Sup. Ct. Rep. 434.

We have seen, to give jurisdiction to the Federal courts by reason of a Federal question, the Federal question must appear in plaintiff's statement of his own case. *Ibid.* The rule is fixed that plaintiff cannot invoke Federal jurisdiction by anticipating in his bill the defense of a Federal question, as, for instance, to set up that defendant will claim that a State statute is invalid under the Federal Constitution. This is not necessary to plaintiff's case. *Metcalf v. Watertown*, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173. See, also, *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 646, 47 L. ed. 635, 23 Sup. Ct. Rep. 440.

Judge Sanborn of the Eighth Circuit strongly combatted this position, and quotes in support of his dissenting opinion in *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 876, *Saginaw Gaslight Co. v.*

Saginaw, 28 Fed. 529; *Smith v. Bivens*, 56 Fed. 352, and other cases, 72 Fed. 880, which he contends clearly show that the plaintiff may raise the Federal question by anticipating the defense; and he claimed that 152 U. S., relied upon by the majority of the court, does not sustain the majority opinion.

If it is true, as broadly stated by some of the cases heretofore referred to, in discussing how the Federal question should appear, that if in any aspect the case may assume the right of recovery may depend on the construction of a Federal statute, a Federal question appears, then it seems Judge Sanborn has a basis for his conclusion. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2-12. See *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 151-153; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90. But the rule is otherwise. The Federal question, to sustain jurisdiction, must be an existing one upon which plaintiff depends to sustain *his* suit, and not one that may or may not arise in the progress of the cause, as before said, to defeat his case. *Joy v. St. Louis*, *supra*. He cannot rest on the doubt as to whether it will be relied on or not. *Ibid.*; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *New Orleans v. Benjamin*, 153 U. S. 430, 38 L. ed. 771, 14 Sup. Ct. Rep. 905; *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 339, 341; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 639, 47 L. ed. 631, 23 Sup. Ct. Rep. 434; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 78, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; *Peabody Gold Min. Co. v. Gold Hill Min. Co.* 49 C. C. A. 637, 111 Fed. 822, 21 Mor. Min. Rep. 591. The jurisdictional allegation must be in the case made in the bill. *Ibid.*; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Wise v. Nixon*, 78 Fed. 204; *Florida v. Charlotte Harbor Phosphate Co.* 20 C. C. A. 538, 41 U. S. App. 405, 74 Fed. 578; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35. But whatever may be the rule in a case of anticipation of the Federal question, when the answer comes in not setting up the Federal question,

the case should be dismissed at once. *Robinson v. Anderson*, 121 U. S. 522-524, 30 L. ed. 1021, 1022, 7 Sup. Ct. Rep. 1011; *Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 114, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Hooker v. Los Angeles*, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 643, 47 L. ed. 633, 23 Sup. Ct. Rep. 434; *Devine v. Los Angeles*, 202 U. S. 338, 50 L. ed. 1055, 26 Sup. Ct. Rep. 652.

Citizenship and Venue When Jurisdiction Rests on a Federal Question.

Citizenship.—When the Federal question is a basis of jurisdiction, the citizenship of parties is not material. Citizens of the same State may sue each other where the recovery is based on a Federal question. *Patton v. Brady*, 184 U. S. 611, 46 L. ed. 715, 22 Sup. Ct. Rep. 493; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520. The same rule applies to suits arising under treaties made by the United States (*Owings v. Norwood*, 5 Cranch, 344, 3 L. ed. 120); that is, where a right is given or protected by treaty.

Venue.—The suit can only be brought in the district where of the defendant is an inhabitant (see chapter 15) and this is true where the suit shows diversity of citizenship and a Federal question (*Newell v. Baltimore & O. R. Co.* 181 Fed. 698), and though the Federal question be added by amendment (*id.*, 700, and cases cited).

Issue, How Raised.

The want of a Federal question in the statement of the case may be raised by motion, or answer. *Fergus Falls v. Fergus Falls Water Co.* *supra*. Of course, if it does not appear, then a demurrer is proper to raise the issue. But if the Federal question appears in the bill, then you must raise the issue by motion or in your answer; however, it seems that unless in the trial of the motion on answer it appears that the allegation of the Federal question was *fraudulently* made to acquire jurisdiction, that it will not affect the final jurisdiction to determine the

case, though it appears upon the merits of the motion that no actual Federal question was involved. *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *Illinois C. R. Co. v. Adams*, 180 U. S. 38, 45 L. ed. 413, 21 Sup. Ct. Rep. 251.

The theory is that there is a distinction between the existence of a Federal question for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether the bill presents a Federal question, and whether it is well founded when considered on its merits, are different questions, and the court must take jurisdiction to determine whether it is well founded. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 178.

In *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681, it was held that the jurisdiction on the ground of a Federal question being asserted, jurisdiction is not defeated because in the trial it does not appear; wherefore a motion to dismiss because no Federal question exists cannot prevail. *Southern P. R. Co. v. California*, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 993; *Nashville, C. & St. L. R. Co. v. Taylor*, *supra*.

In *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223, it was held that jurisdiction must be taken to determine the fact as to whether the claim of the existence of a Federal question is meritorious; that is, it depended on the allegations in the bill, and not on the facts appearing subsequently. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 204, 24 L. ed. 659. Of course, the claim must be real and colorable, not fictitious and fraudulent. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353. It is said in *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, that all that is necessary to establish jurisdiction is to show that complainant had in good faith asserted the claim. *Fergus Falls v. Fergus Falls Water Co.* 12 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 883; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* *supra*. So then, to raise the issue by motion or answer it must be alleged that the allegation is fictitious and fraudulent, and it must be shown, or jurisdiction is not affected.

In the light of the fact that the Federal court is one of limited jurisdiction, I cannot appreciate the soundness of the reasoning

that makes a mere statement of a Federal question, though not true, sufficient to sustain jurisdiction. If it is a fundamental ground of jurisdiction, its existence, and not a mere allegation, should be shown. While the allegation and issue thereon may bring it within the jurisdiction to determine the particular issue, upon what rests the further power of the court to proceed after determining the fundamental ground does not exist? The decisions which hold that the suit should be dismissed seems to me to be true construction, as it is the logical conclusion from the conditions (see *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 872; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra); that is, a want of power in a court of limited jurisdiction. Act Mch. 3d, 1875, sec. 5, Comp. Stat. 1913, sec. 1019.

If the Federal question does not appear in the bill, you may raise the issue by motion or answer. If it is an issue of law you may use the form given under diversity of citizenship.

If the allegation of a Federal question is sufficient, but not true, you may raise the issue by motion in the nature of a plea or in the answer as follows:

A. B.		In the District Court of the United
vs.	In Equity.	States for the..... District of
C. D.	, sitting at

And now comes the defendant C. D. (or defendants naming them) and this his motion to dismiss this cause, because this court should not take jurisdiction of this suit, for that the said suit does not really and substantially involve a suit or controversy properly within its jurisdiction, for that said suit is wholly based on the alleged existence of a Federal question, and the allegations that said suit is dependent on a construction of the constitution and laws of the United States (or whatever may be the allegations as to the Federal question), are not truly and in good faith made, but on the contrary, the averments in the bill as aforesaid are stated with the false and fraudulent purpose of imposing on the jurisdiction of this court. Wherefore defendant says that the allegations are fictitious and fraudulent.

All of which he avers to be true, and pleads the same in bar of complainant's said bill, and prays the judgment of this court whether he should answer, further pray to be hence dismissed with costs.

R. F.,
Solicitor, etc.

The same form may be used if the Federal question is denied in the answer.

CHAPTER XXIX.

AMOUNT.

Equally important and fundamental as one of the elements of jurisdiction of the Federal courts is the amount or value of the subject-matter in litigation, and it is essential, though there be diversity of citizenship, or a Federal question. *Holt v. Indiana Mfg. Co.* 176 U. S. 72, 73, 40 L. ed. 376, 377, 20 Sup. Ct. Rep. 272; *United States v. Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; *Tupino v. La Compania General De Tabacos De Filipinas*, 214 U. S. 268, 53 L. ed. 992, 29 Sup. Ct. Rep. 610; *Shewalter v. Lexington*, 143 Fed. 161; *Fishback v. Western U. Teleg. Co.* 161 U. S. 99, 40 L. ed. 631, 16 Sup. Ct. Rep. 506.

The amount or value of the subject-matter or right being litigated must, under the act of 1888, exceed the sum of two thousand dollars, exclusive of interest and costs. Prior to this act the amount was only five hundred dollars, exclusive of costs. Under the New Code, chap. 2, sec. 24, ¶ 1, (Comp. Stat. 1913, sec. 991), the amount to give jurisdiction must be in excess of three thousand dollars exclusive of interest and costs. The gradual increase of the jurisdictional amount was intended to curtail the jurisdiction of the Federal courts. *Taylor v. Midland Valley R. Co.* 197 Fed. 323. It must be in excess of three thousand dollars. *Royal Ins. Co. v. Stoddard*, 120 C. C. A. 434, 201 Fed. 916. Under this act amount is material, except when the United States is a party, or citizens of the same State are claiming under a grant from a different State. *United States v. Reid*, 90 Fed. 522; *United States v. Sayward*, *supra*; *Risley v. Utica*, 168 Fed. 744; *Turner v. Jackson Lumber Co.* 87 C. C. A. 103, 159 Fed. 923-925; *Purnell v. Page*, 128 Fed. 496. See new Code, chap. 2, sec. 24, ¶¶ 2 to 25, specifying cases in which the amount is not essential to jurisdiction.

"Matter in Dispute."

"The matter in dispute," as used in the statute, means the matter for which the suit in good faith is brought, and issue joined. *Smith v. Adams*, 130 U. S. 167-175, 32 L. ed. 895-898, 9 Sup. Ct. Rep. 566; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53-55; *Bruce v. Manchester & K. R. Co.* 117 U. S. 514, 29 L. ed. 990, 6 Sup. Ct. Rep. 849; *Risley v. Utica*, 168 Fed. 747; *Union P. R. Co. v. Cunningham*, 173 Fed. 92; *Lee v. Watson*, 1 Wall. 339, 17 L. ed. 558; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 313; *Ung Lung Chung v. Holmes*, 98 Fed. 323; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 593; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 803; *Gorman v. Havird*, 141 U. S. 206, 35 L. ed. 717, 11 Sup. Ct. Rep. 943. And when jurisdiction depends on it, the matter in dispute must be capable of estimation in money (*Gaines v. Fuentes*, 92 U. S. 10-20, 23 L. ed. 524-528; *Schunk v. Moline, M. & S. Co.* 147 U. S. 504, 37 L. ed. 258, 13 Sup. Ct. Rep. 416), for when the matter is entirely incapable of pecuniary estimation, there can be no jurisdiction, as in a suit for the custody of a child. Amount in dispute and amount involved have the same legal significance. *Decker v. Williams*, 73 Fed. 310; *Reynolds v. Burns*, 141 U. S. 117, 35 L. ed. 648, 11 Sup. Ct. Rep. 942.

When the suit is for a money demand, the amount demanded in the body of the petition fixes the jurisdiction. *Peeler v. Lathrop*, 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 780; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 870; *Greene County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 801; *Hilton v. Dickinson*, 108 U. S. 165-174, 27 L. ed. 688-691, 2 Sup. Ct. Rep. 424; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 9; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Lee v. Watson*, *supra*; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 473; *Kunkel v. Brown*, *supra*; *Kearney County v. Vandriss*, 53 C. C. A. 192, 115 Fed. 872; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 742, 743; *Turner v. Southern Home Bldg. & L. Asso.*

41 C. C. A. 379, 101 Fed. 313; *State Bank v. Cox*, 74 C. C. A. 285, 143 Fed. 92.

When property is sued for, and the petition shows the value, it is taken as *prima facie* correct (*Bennett v. Butterworth*, 8 How, 128, 12 L. ed. 1015), and until it is in some way shown in the record that the sum stated is not the matter in controversy, it will be sufficient for jurisdiction. *King v. Southern R. Co.* 119 Fed. 1016; *Hilton v. Dickinson*, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; *Battle v. Atkinson*, 115 Fed. 384, 385. In a word, the court is governed by the claim made, provided there is no reason to believe that it was falsely made to obtain jurisdiction. *Ibid.*; *Holden v. Utah & M. Machinery Co.* 82 Fed. 209; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 6, 7; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 806; *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501. It is not essential to state the amount or value if it appears from the allegations or record or from evidence taken in the case before hearing on the jurisdiction. *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 804, 806. If apparently fraudulent, no jurisdiction will be taken. *American Wringer Co. v. Ionia*, 76 Fed. 6, 7; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *Green County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 802; *Simon v. House*, 46 Fed. 321; *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 614, 29 L. ed. 503, 6 Sup. Ct. Rep. 192; *Fishback v. Western U. Teleg. Co.* 161 U. S. 100, 40 L. ed. 631, 16 Sup. Ct. Rep. 506; *Vance v. W. A. Vandercook Co.* 170 U. S. 472, 42 L. ed. 1112, 18 Sup. Ct. Rep. 645; *Hampton Stave Co. v. Gardner*, 83 C. C. A. 521, 154 Fed. 806. The court looks to the record, which must create a legal certainty of want of jurisdictional amount. *Barry v. Edmunds*, 116 U. S. 559, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Waite v. Santa Cruz*, 184 U. S. 327, 46 L. ed. 568, 22 Sup. Ct. Rep. 327; *Kunkel v. Brown*, *supra*; *Interstate Bldg. & L. Asso. v. Edgefield Hotel Co.* 109 Fed. 692, 693; *Battle v. Atkinson*, 115 Fed. 385; *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 611-613, 29 L. ed. 502, 503, 6 Sup. Ct. Rep. 192; *Bank of Arapahoe v. David Bradley & Co.* *supra*; *Hampton Stave Co. v. Gardner*, 83 C. C. A. 521, 154 Fed. 805. And if less than jurisdictional amount cannot be le-

gally inferred from the bill the case must go to trial. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210. But the case should be dismissed if the evidence shows fraudulent statement of value to give jurisdiction (*Horst v. Merkley*, 59 Fed. 502; *Simon v. House*, 46 Fed. 318; *Bank of Arapahoe v. Bradley & Co.* *supra*); or that plaintiff cannot legally be permitted to sustain his claim (*North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869).

Cases Classified.

With these general observations I will now discuss the three classes of cases in which the question of amount as affecting jurisdiction has been raised.

First. Where a specific amount is sued for.

Second. When the value of the subject-matter or right in issue has been disputed.

Third. When the case sounds in damages.

When a Specific Amount is Sued For.

Under this head the specific amount sued for, or the amount recoverable under the allegations, is liquidated by the terms of the alleged agreement, and about this class of contracts there can be no difficulty (*Peeler v. Lathrop*; *Greene County Bank v. J. H. Teasdale Commission Co.*; *Hampton Stave Co. v. Gardner*; and *Bank of Arapahoe v. David Bradley & Co.*—*supra*; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Denver City Tramway Co. v. Norton*, 73 C. C. A. 1, 141 Fed. 599; *Ung Lung Chung v. Holmes*, and *Simon v. House*, *supra*; *Gray v. Blanchard*, 97 U. S. 565, 24 L. ed. 1109; *Schacker v. Hartford F. Ins. Co.* 93 U. S. 241–242, 23 L. ed. 862), unless the question arises when the original amount sued for had been reduced below the jurisdiction of the court by a payment of valid set-off. In such cases, if the plaintiff before bringing suit knew that his claim had been reduced by a valid payment, or some valid set-off, so that its extreme limit did not fall within the amount giving jurisdiction, then there is no jurisdiction, as it may be concluded that

the amount as stated was for the sole purpose of getting jurisdiction. *Bedford Quarries Co. v. Welch*, 100 Fed. 513; *Pickham v. Wheeler-Bliss Mfg. Co.* 23 C. C. A. 391, 46 U. S. App. 605, 77 Fed. 663; *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 68; *Schunk v. Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 7. So, where land is sued for, over the value of three thousand dollars, and defendant disclaims as to all but a small portion under the value of three thousand dollars, it would not affect the jurisdiction (*Way v. Clay*, 140 Fed. 352; *Alkire Grocery Co. v. Richesin*, 91 Fed. 84); but the facts must create a legal certainty of that conclusion (*Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Holden v. Utah & M. Machinery Co.* *supra*; *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Maffet v. Quine*, 95 Fed. 199; *Kunkel v. Brown*, *supra*).

It is not to be understood that jurisdiction is ousted because some defense may be made, or is made, which reduces the amount set up in the bill. *United States v. Swift*, 71 C. C. A. 351, 139 Fed. 227; *Kearny County v. Vandriss*, *supra*; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801-811; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 314; *Ung Lung Chung v. Holmes*, 98 Fed. 326; *Kunkel v. Brown*, and *Tennent-Stribling Shoe Co. v. Roper*, *supra*; *Jones v. McCormick Harvesting Mach. Co.* 27 C. C. A. 133, 53 U. S. App. 408, 82 Fed. 295; *Jones v. Rowley*, 73 Fed. 288, 289. In fact, it was held, in *Schunk v. Moline, M. & S. Co.* *supra*, that a valid defense, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine the matter in dispute, for who can say in advance that the defense will be insisted on, or, if presented, will be sustained by the court? The rule may be stated, that if it is necessary, to ascertain the amount, to consider conflicting evidence as to claim of payment or set-off, or to decide disputed questions of law affecting the amount, then the court will take jurisdiction, even though on trial a less amount be found. *Ibid.*; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 7-9; *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 69.

Thus, in a suit in which various accounts have been aggregated to give jurisdiction, a court will take jurisdiction, even though some of the accounts be successfully attacked and the claim reduced below the jurisdiction. *Tennent-Stribling Shoe Co. v. Roper*, *supra*.

In Texas, as decided in *Lowe v. Dowbarn*, 26 Tex. 507, and *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093, it seems that if exceptions be taken to certain aggregated items, and they be sustained, and the amount is left below the jurisdiction, the case will be dismissed. *Missouri, K. & T. R. Co. v. Kolbe*, 95 Tex. 76, 65 S. W. 34, see also *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806, 808. When the amount is reduced below the jurisdiction by the plea of limitations to certain of the aggregated items, this will not affect the jurisdiction, as limitation is a plea of privilege, which may or not be pleaded. *Hardin v. Cass County*, 42 Fed. 652-657; *Waterfield v. Rice*, 49 C. C. A. 504, 111 Fed. 625; *Kearny County v. Vaudriss*, 53 C. C. A. 192, 115 Fed. 867.

It appears, then, from the cases cited that it is not the amount plaintiff is able to prove when the jurisdictional amount is alleged, but was the demand made in good faith, and he has simply been mistaken as to the fact or the law. *Interstate Bldg. & L. Asso. v. Edgefield Hotel Co.* 109 Fed. 692; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 594; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801; *Put-in-Bay Waterworks, Light & R. Co. v. Ryan*, 181 U. S. 432, 433, 45 L. ed. 938, 21 Sup. Ct. Rep. 709; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89; *Ung Lung Chung v. Holmes*, 98 Fed. 325.

By good faith is meant that the sum demanded is the real matter put in dispute (*Hilton v. Dickinson*, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210), and not so manifestly fictitious as to make it legally certain that the amount alleged was only to get jurisdiction (*Jones v. McCormick Harvesting Mach. Co.* *supra*; *Battle v. Atkinson*, 115 Fed. 384), because clearly beyond a reasonable expectation of recovery (*Holden v. Utah & M. Machinery Co.* 82 Fed. 209; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867; *Kunkel v. Brown*, *supra*; *Vance v. W. A. Vandercook*

Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286).

Of course, in determining the bona fides of the allegation of amount, a plaintiff can be held to the knowledge of well-settled principles of law. So if an attempt is made to add an additional amount, which, under rules of law, would not be admissible, or something is set up easily susceptible of proof, and none is offered, or no satisfactory explanation given, then such a claim must be held to be fictitious. *Bank of Arapahoe v. David Bradley & Co.* *supra*. But in *Holden v. Utah & M. Machinery Co.* *supra*, it is said it would require a very strong case to justify a court in finding that a plaintiff had no reasonable expectation of recovery of the amount as alleged. *Hayward v. Nordberg Mfg. Co.* *supra*; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; see *Simon v. House*, 46 Fed. 318, collecting cases. If, however, the action is for a trespass, or otherwise sounding in damages, where no limitation is prescribed by law to the amount that may be recovered, then the estimate that plaintiff puts as his damages must control, as this fixes the demand in dispute, whatever may be the sum recovered. *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Herbert v. Rainey*, 54 Fed. 251; *Levinski v. Middlesex Bkg. Co.* 34 C. C. A. 452, 92 Fed. 458; *Smith v. Greenhow*, 109 U. S. 671, 27 L. ed. 1081, 3 Sup. Ct. Rep. 421. (See "Amount in Cases Sounding in Damages.")

CHAPTER XXX.

AGGREGATING AMOUNTS.

When several persons have a common and undivided interest in a claim, and join in a suit, the amount of the joint claim fixes the jurisdiction. *Holt v. Bergevin*, 60 Fed. 2; *Wheless v. St. Louis*, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, 96 Fed. 867; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *McDaniel v. Traylor*, 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Thomas v. Green County*, 89 C. C. A. 405, 159 Fed. 341; *Hagge v. Kansas City S. R. Co.* 104 Fed. 393; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Gibson v. Shufeldt*, 122 U. S. 30-33, 30 L. ed. 1084, 1085, 7 Sup. Ct. Rep. 1066; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 739. See *Hartford F. Ins. Co. v. Erie R. Co.* 172 Fed. 899, 902; *Eaton v. Hoge*, 72 C. C. A. 74, 141 Fed. 66, 5 A. & E. Ann. Cas. 487. But if the interests are distinct, then they cannot join for convenience the several amounts due each, if the separate interests be less in amount than is necessary for jurisdiction. To join distinct interests, each interest must reach the jurisdictional amount. *Ibid.*; *Jones v. Mutual Fidelity Co.* 123 Fed. 510; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Risley v. Utica*, 168 Fed. 744; *McDaniel v. Traylor*, 123 Fed. 338; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 814; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Citizens' Bank v. Cannon*, 164 U. S. 322, 41 L. ed. 452, 17 Sup. Ct. Rep. 89; *Wheless v. St. Louis*, *supra*; *Waite v. Santa Cruz*, 184 U. S. 328, 46 L. ed. 568, 22 Sup. Ct. Rep. 327; *Brown v. Denver*, 186 U. S. 480, 46 L. ed. 1259, 22 Sup. Ct. Rep. 943; *The Joseph B. Thomas*, 78 C. C. A. 428, 148 Fed. 767; *Troy*

Bank v. Whitehead, 184 Fed. 932-935; Simpson v. Geary, 204 Fed. 507. And this is true, though they join a class or party whose rights and liabilities arose out of the same transaction, or related to a common fund sought to be administered. *Ibid.*; Clay v. Field, *supra*; Smithson v. Hubbell, 81 Fed. 593, 594; Cowell v. City Water Supply Co. 57 C. C. A. 393, 121 Fed. 56; Chatfield v. Bogle, 105 U. S. 233, 26 L. ed. 945; Russell v. Stansell, 105 U. S. 304, 26 L. ed. 990; Seaver v. Bigelow, 5 Wall. 210, 211, 18 L. ed. 595, 596; Putney v. Whitmire, 66 Fed. 387. It may be a common fund involved in the litigation which exceeds the jurisdictional amount, but if each creditor can only recover the amount due him out of the fund, and said amounts are less than the jurisdictional amount, then the case should be dismissed. Gibson v. Shufeldt, 122 U. S. 35, 30 L. ed. 1086, 7 Sup. Ct. Rep. 1066; Russell v. Stansell, 105 U. S. 303, 26 L. ed. 989. Thus, a bill by a stockholder in behalf of himself and others must show the value of the stock held by him equals the jurisdictional amount, or exceeds it. Smithson v. Hubbell, 81 Fed. 593; Harvey v. Raleigh & G. R. Co. 89 Fed. 117, 118; Troy Bank v. Whitehead, 184 Fed. 935; Risley v. Utica, 179 Fed. 877. There is a conflict of authorities on this proposition. See Jacobs v. Mexican Sugar Co. 130 Fed. 591; Carpenter v. Knollwood Cemetery, 198 Fed. 297.

The rule, however, does not apply to assignments for the benefit of creditors, if the application is to protect the fund and enforce an execution of the trust, as in such cases the fund, and not plaintiff's demand, gives the jurisdiction. Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; Jones v. Mutual Fidelity Co. 123 Fed. 513-515; Towle v. American Bldg. Loan & Invest. Soc. 60 Fed. 131; Putnam v. Timothy Dry Goods & Carpet Co. 79 Fed. 454; Colston v. Southern Home Bldg. & L. Asso. 99 Fed. 305; Estes v. Gunter, 121 U. S. 183, 30 L. ed. 884, 7 Sup. Ct. Rep. 854. So in proceeding against insolvent corporations. Taylor v. Decatur Mineral & Land Co. 112 Fed. 450; Jones v. Mutual Fidelity Co. 123 Fed. 506; Kent v. Honsinger, 167 Fed. 620. (See "Creditors Suit.")

A single plaintiff cannot join several defendants, against whom he has claims of a similar character, in order to reach the jurisdictional amount. The claim against each defend-

ant must be of the jurisdictional amount to be joined if a joint judgment cannot be taken. *McDaniel v. Traylor*, 123 Fed. 339, see 196 U. S. 415-427, 49 L. ed. 533-538, 25 Sup. Ct. Rep. 369; *Busey v. Smith*, 67 Fed. 15, 16; *Henderson v. Wadsworth*, 115 U. S. 276, 29 L. ed. 379, 6 Sup. Ct. Rep. 140; *Walter v. Northeastern R. Co.* 147 U. S. 376, 37 L. ed. 208, 13 Sup. Ct. Rep. 348; *Seaver v. Bigelow*, 5 Wall. 208, 18 L. ed. 595; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Shewalter v. Lexington*, 143 Fed. 163, 164; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Ex parte Phoenix Ins. Co.* 117 U. S. 367-369, 29 L. ed. 923, 924, 6 Sup. Ct. Rep. 772. Thus, you cannot aggregate amount against several insurance companies. *Wisconsin C. R. Co. v. Phoenix Ins. Co.* 123 Fed. 989. The rule applicable to several plaintiffs having separate claims that each must be in the jurisdictional amount is applicable when several defendants were sued. *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348. When claims of various parties have been assigned to one party such party can aggregate the amounts for the purpose of jurisdiction, provided the assignors, by reason of diversity of citizenship, could have sued in the Federal courts, if the amount had been jurisdictional. *Chase v. Sheldon Roller Mills Co.* 56 Fed. 625; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; *Bergman v. Inman*, 91 Fed. 294; *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769; *Davis v. Mills*, 99 Fed. 40. (See "Jurisdiction by Assignment.")

What may be Included in Amount to Give Jurisdiction.

As stated by the judiciary act, the *matter in dispute* must exceed, exclusive of interest and costs, the sum or value of three thousand dollars. In making up the amount it has been decided that you cannot add mere items of expense in connection with the cause of action, unless it was agreed between the parties that the expense was to be incurred, or from the nature of the contract could be reasonably implied. *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 471. There

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was, however, a vigorous dissenting of opinion to the application of the rule in this particular case. You can add attorneys' fees when a part of the contract. *Rogers v. Riley*, 80 Fed. 762; *Swofford v. Cornucopia Mines*, 140 Fed. 958; *Howard v. Carroll*, 195 Fed. 647.

You cannot, however, sue on a bond or other written instrument to pay money, and add to it damages for a breach, in order to make the amount jurisdictional. *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 473; *Hilton v. Dickinson*, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424. The rule seems to be that where the law gives no rule that fixes the damage in any particular case, then the plaintiff's demand must furnish the basis of jurisdiction; but when the law does give a rule, as interest, then the cause of action must control, and not the demand. *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Barry v. Edmunds*, 116 U. S. 550-556, 29 L. ed. 729-731, 6 Sup. Ct. Rep. 501; *Simon v. House*, 46 Fed. 321. Thus in cases of debt evidenced by written instruments, interest is the damage permitted by law, and the character of demand cannot be added to by alleging any further damage in order to increase the amount. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501.

So in cases of contract where the amount recoverable is liquidated by the terms of the agreement, the limit of recovery is fixed, and you cannot add to it to obtain jurisdiction. *Lee v. Watson*, 1 Wall. 339, 17 L. ed. 558; *Bergman v. Inman*, 91 Fed. 293; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 595.

In this character of cases the sum demanded beyond what the law or parties have fixed as the limit of recovery is clearly the matter in dispute (*Bowman v. Chicago & N. W. R. Co.* 115 U. S. 614, 29 L. ed. 503, 6 Sup. Ct. Rep. 192; *Barry v. Edmunds*, 116 U. S. 550-556, 29 L. ed. 729-731, 6 Sup. Ct. Rep. 501), but you may bring suit on notes due, and those not due, arising out of the same transaction, and thus acquire the jurisdictional amount. In suits upon bonds and coupons, the interest on them cannot be added. *Greene County v. Kortrecht*, 26 C. C. A. 381, 52 U. S. App. 250, 81 Fed. 241, and authorities cited. But it seems you may include matured coupons in making jurisdictional amount, as they are separable

independent promises, and not interest within the meaning of the statute. *Edwards v. Bates County*, 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. Rep. 967; *Home & F. Invest. & Agency Co. v. Ray*, 69 Fed. 657,—overruled; *Independent School Dist. v. Reid*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 4.

Foreclosure of Mortgage.

Falling within the rule, the specific amount sued for controls the jurisdiction on foreclosures of chattel mortgages, and not the value of the property mortgaged. *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 68; *Wakeman v. Throckmorton*, 124 Fed. 1010; *Gibson v. Shufeldt*, 122 U. S. 29, 30 L. ed. 1084, 7 Sup. Ct. Rep. 1066; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89; *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 130, 36 L. ed. 640, 12 Sup. Ct. Rep. 815. But you may aggregate several notes and mortgages against the same party. *Fitchett v. Blows*, 20 C. C. A. 286, 36 U. S. App. 597, 74 Fed. 49; *Fitch v. Creighton*, 24 How. 159, 16 L. ed. 596; *O'Connel v. Reed*, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 531. The rule has been declared otherwise in Texas, that is, the value of the property upon which foreclosure is sought determines jurisdiction. *Texas & N. O. R. Co. v. Rucker*, 38 Tex. Civ. App. 591, 88 S. W. 816.

Creditors' Suits.

The amount claimed by the creditor, and not the value of the property, determines jurisdiction. *Alkine Grocery Co. v. Richesin*, 91 Fed. 84 and authorities cited; *Jacobs v. Mexican Sugar Co.* 130 Fed. 591; *Werner v. Murphy*, 60 Fed. 769; *Putney v. Whitmire*, 66 Fed. 387. The only interest of the creditor is his individual claim, for if paid it destroys his interest, and this must test the matter in controversy. *Ibid.*

Creditors cannot unite their interests to make the jurisdictional amount (*Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163), but may in good faith assign their interests to one who may aggregate the claims to obtain the jurisdictional amount (*Alkire Grocery Co. v. Richesin*, *supra*; *Putney v. Whitmire*, 66 Fed. 385; *Crawford v. Neal*, 144 U.

S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Marion v. Ellis*, 10 Fed. 410; *Collinson v. Jackson*, 8 Sawy. N. Y. 357, 14 Fed. 309). But if one complainant in a creditors' suit has recovered a judgment for over two thousand dollars, other creditors holding smaller judgments may unite with him in the suit. *Huff v. Bidwell*, 81 C. C. A. 43, 151 Fed. 564, 103 Fed. 363; *Stanwood v. Wishard*, 134 Fed. 959; *Belmont Nail Co. v. Columbia Iron & Steel Co.* 46 Fed. 337.

CHAPTER XXXI.

BY AND AGAINST FEDERAL RECEIVERS.

Prior to the act of 1888, section 3, suits could only be brought against Federal receivers by permission of the court appointing the receiver. *Barton v. Barbour*, 104 U. S. 128, 26 L. ed. 674. Such suits were considered purely ancillary to the main suit (*Porter v. Sabin*, 36 Fed. 477; *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. 313; *Gilmore v. Herrick*, 93 Fed. 526), and fell within the jurisdiction of the appointing court, without reference to amount or citizenship. (*Carpenter v. Northern P. R. Co.* 75 Fed. 850; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 118 Fed. 204; *Hampton Roads R. & Electric Co. v. Newport News & O. P. R. & Electric Co.* 131 Fed. 534.)

But since the act of 1888, section 3, which permits suits against a Federal receiver in any court of competent jurisdiction, without the consent of the appointing court, in respect to *any act or transaction* of the receiver in carrying on the business connected with such property, the right of plaintiff to select his own court having jurisdiction of the subject-matter (except as modified by the removal act, *Tompkins v. MacLeod*, 96 Fed. 927; *Marrs v. Felton*, 102 Fed. 775, 776) was secured. See sec. 66, New Code, chap. 4, embodying sec. 3, act of 1888, Comp. Stat. 1913, sec. 1048; *Love v. Louisville & E. R. Co.* 178 Fed. 507; *Central Trust Co. v. Wheeling & L. E. R. Co.* 189 Fed. 82; *Smith v. Jones Lumber & Mercantile Co.* 200 Fed. 647.

Federal courts could no longer draw to themselves jurisdiction of suits against their receivers by process of contempt, or injunction. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. 523; *Gilmore v. Herrick*, *supra*. And suits thus brought were no longer in the class of ancillary suits, but became original suits against the receiver, in which the amount,

and some Federal ground of jurisdiction, became material to jurisdiction. Ibid.; Ray v. Pierce, 81 Fed. 881, 882; Pitkin v. Cowen, 91 Fed. 599; Tompkins v. MacLeod, *supra*; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Pepper v. Rogers, 128 Fed. 988; Carpenter v. Northern P. R. Co. *supra*; and Sullivan v. Barnard, 81 Fed. 886, held a contrary doctrine, but it is not the rule as now administered.

You will notice, however, that the language of the act is, that where the suit is in respect of *any act* or transaction of the receiver (McNulta v. Lochridge, 141 U. S. 331, 35 L. ed. 799, 12 Sup. Ct. Rep. 11) in the administration of the trust, then the receiver can be sued in any court of competent jurisdiction, and it is in such cases amount is important. Coster v. Parkersberg Branch R. Co. 131 Fed. 115; Pitkin v. Cowen, 91 Fed. 602; Royal Trust Co. v. Washburn, B. & I. R. R. Co. 113 Fed. 532; Re Kalb & B. Mfg. Co. 165 Fed. 896; Love v. Louisville & E. R. Co. 178 Fed. 507.

An action in a State court against a receiver for damages for personal injuries arises under the general law of liability for damages, and comes within the above rule. Ibid.; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 340, 341, 45 L. ed. 223, 224, 21 Sup. Ct. Rep. 171, 41 C. C. A. 160, 101 Fed. 6; Shearing v. Trumbull, 75 Fed. 33; Bausman v. Dixon, 173 U. S. 113, 114, 43 L. ed. 633, 634, 19 Sup. Ct. Rep. 316; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 384, 48 L. ed. 490, 24 Sup. Ct. Rep. 325; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854. So, where an action is brought by a receiver in a Federal court, other than that of its appointment, then amount is jurisdictional. Sullivan v. Swain, 96 Fed. 259.

There are still many suits that arise in the administration of a Federal receivership that are only ancillary, and which are not suits in respect of any act or transaction of the receiver. In such suits the manner of *amount* and citizenship does not affect the jurisdiction of the Federal court appointing the receiver. Thus, where a receiver in administering his trust, brings an action in the court appointing him in aid of his trust, the matter of amount is not important, neither is citizenship. White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup.

Ct. Rep. 1018; *Brown v. Allebach*, 156 Fed. 697; *Rause v. Letcher*, 156 U. S. 49, 53, 39 L. ed. 342, 343, 15 Sup. Ct. Rep. 266; *Gunby v. Armstrong*, 66 C. C. A. 627, 133 Fed. 417; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Bottom v. National R. Bldg. & L. Asso.* 123 Fed. 745; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Bowman v. Harris*, 95 Fed. 917; *Gilmore v. Herrick*, *supra*. See also *Dale v. Smith*, 182 Fed. 363; *Trust Co. v. Chicago, P. & St. L. R. Co.* 199 Fed. 593.

Thus, a receiver may recover assets in the hands of others, if there is no right asserted by the party in possession adverse to the claim of the receiver without reference to the value of the asset. *Ibid*.

Or when he seeks to foreclose a mortgage in behalf of the fund by order of the court. *Gunby v. Armstrong*, *supra*; *American Loan & T. Co. v. Central Vermont R. Co.* 86 Fed. 390; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497.

Or when it is sought to deal with the property in the hands of the court to subject it to sale, or because of some claim or right in and to the property thus situated. *Gilmore v. Herrick*, *supra*; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 735; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182; *New Orleans v. Howard*, 87 C. C. A. 345, 160 Fed. 393.

Or on any cause of action not arising out of any act of the receiver in carrying on the business of the receivership. *Porter v. Sabin*, 149 U. S. 479, 37 L. ed. 818, 13 Sup. Ct. Rep. 1008; *Compton v. Jesup*, *supra*; *Buckhannon & N. R. Co. v. Davis*, 68 C. C. A. 345, 135 Fed. 707.

So in receiverships of national banks, where jurisdiction is specially reserved by the act of 1888, where amount is not important when necessary to sue. Sec. 4, act 1888; *Earle v. McCartney*, 109 Fed. 13; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370. (See *Smithson v. Hubbell*, 81 Fed. 593.) (See "Receivers as Parties".) Appendix, chap. 2, ¶ 24, Judicial Code (Comp. Stat. 1913, sec. 991).

When a receiver is sued, it is in effect against the receivership, and his liability is official, and not personal. *Smith v. Jones Lumber & Mercantile Co.* 200 Fed. 650, and cases cited; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008.

CHAPTER XXXII.

AMOUNT IN INJUNCTIONS.

To ascertain the value of the "matter in dispute" or subject-matter of the litigation, where jurisdiction depends on amount in controversy, resort must be had to the character of the action. *Simon v. House*, 46 Fed. 318.

In all suits for the specific recovery of property, the value of the property in issue is the measure of jurisdiction, and ordinarily presents no practical difficulty. Thus, in trying title to land or the interest of plaintiff in property, real or personal, the value of the property or interest is easily ascertained (*Bennett v. Butterworth*, 8 How. 128, 129, 12 L. ed. 1015, 1016; *Simon v. House*, *supra*; *Way v. Clay*, 140 Fed. 352; *King v. Southern R. Co.* 119 Fed. 1016; *Insurance Co. of N. A. v. Srendson*, 74 Fed. 347; *Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195, 34 L. ed. 95, 10 Sup. Ct. Rep. 728; *Smithers v. Smith*, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297; *Butters v. Carney*, 127 Fed. 623), and the value alleged controls, unless so grossly excessive as to evidence a want of good faith in the allegation (*Ibid.*; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210).

Some difficulty arises, however, in enforcing purely equitable remedies, such as injunctions, specific performance, cancellation, and rescission, quieting title, or removing cloud, and in appointing receivers, in ascertaining the value of the right claimed as controlling jurisdiction.

So far the preceding chapters have dealt with the amount or value of the subject-matter in issue that could be recovered by law as the measure of jurisdiction; but this is not the general rule applicable to injunctions; while there is a large class of cases where the direct pecuniary loss sought to be prevented by injunction would be the measure, and not contingent loss,—as, where one seeks to enjoin an execution for an amount less than two thousand dollars as in *Ross v. Prentiss*, 3 How. 772, 11 L. ed. 824, where jurisdiction was denied. *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 130, 131, 36 L. ed. 648, 649, 12 Sup. Ct. Rep. 815; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53.

Or where the individual taxpayer seeks to restrain the issue of bonds by a city, and his personal interest is less than the jurisdictional amount, the jurisdiction fails. *Purnell v. Page*, 128 Fed. 496, 498, and authorities cited; *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *El Paso Water Co. v. El Paso*, 152 U. S. 157, 38 L. ed. 396, 14 Sup. Ct. Rep. 494.

See *Ottumway v. City Water Supply Co.* 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 318; *Helena v. Helena Waterworks Co.* 97 C. C. A. 320, 173 Fed. 18; *Holt v. Indiana Mfg. Co.* 176 U. S. 72, 44 L. ed. 376, 20 Sup. Ct. Rep. 272; *Coulter v. Fargo*, 62 C. C. A. 444, 127 Fed. 912.

So where the tax sought to be enjoined is on land, it would be the amount of the tax, and not the value of the land, necessary to support jurisdiction. *Ibid.*; *Douglas v. Stone*, 110 Fed. 812, 815; *Eachus v. Hartwell*, 112 Fed. 564; *Turner v. Jackson Lumber Co.* 87 C. C. A. 106, 159 Fed. 926, and authorities cited.

So, where adjoining owners of lots unite to enjoin the tax upon their lots, the assessment of each must be over three thousand dollars. *Ibid.*; *Wheless v. St. Louis*, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, 96 Fed. 866; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Ogden City*

v. *Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

So where it is sought to enjoin the payment of a dividend, the amount of plaintiff's claim must govern. *Smithson v. Hubbell*, 81 Fed. 593; *Clay v. Field*, 138 U. S. 464-483, 34 L. ed. 1044-1051, 11 Sup. Ct. Rep. 419.

So, a stockholder suing must rest upon his individual holding for jurisdiction, where he is seeking to recover a personal judgment against a corporation.

But there is a class of injunctions where the value of the right to be protected is much greater than the value of the property about which the dispute originated, and in which the value of the right to be protected or the extent of the injury to be prevented fixes the jurisdiction without reference to the amount that may be recovered by law. *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 1; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Anderson v. Bassman*, 140 Fed. 14; *Evenson v. Spaulding*, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; *Board of Trade v. Cella Commission Co.* 76 C. C. A. 28, 145 Fed. 28, 29; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399; *Humes v. Ft. Smith*, 93 Fed. 857; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 743; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532.

To illustrate: In *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, the railroad company sought to enjoin one Kuteman from prosecuting in a state court a number of small suits for penalties for overcharges for freight. The court held the maintenance of the schedule rate was a right to be protected, and being the real matter in dispute, and of a value exceeding two thousand dollars, the court had jurisdiction. The value of the object to be obtained and the right to be protected controls, says the court. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 5.

So we have had many suits to enjoin railroad companies from establishing a new schedule of rates, where the value of the right was only considered as the basis of jurisdiction, as in *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso.* 91 C. C. A. 39, 165 Fed. 2-11; *Chesapeake & D. Canal Co. v. Gring*, 86 C. C. A. 539, 159 Fed. 662; *Southern P. Co. v. Bartine*, 170 Fed. 765.

So the property right of a board of trade in its market quotations is the basis of jurisdictional value, when an injunction is sought to protect it. *Board of Trade v. Cella Commission Co.* supra; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 31.

So in restraining brokerage in railway tickets. *Nashville, C. & St. L. R. Co. v. McConnell*, supra; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co.* 119 Fed. 948; *Louisville & N. R. Co. v. Bitterman*, 128 Fed. 176, 178n, 75 C. C. A. 192, 144 Fed. 44, 207 U. S. 222, 223, 52 L. ed. 182, 183, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; *Pennsylvania Co. v. Bay*, 138 Fed. 203.

In *Lanning v. Osborn*, 79 Fed. 661, it was held that in a suit to enjoin the interference with the water rates of a city, the right to fix rates and its value determined jurisdiction, and not the difference between the annual rate contended for by the defendant and that asserted by the plaintiff. *Board of Trade v. Cella Commission Co.* 145 Fed. 28.

So where injunctions are sued out to prevent destruction or injury to property, the jurisdiction is ordinarily fixed by the value of the property to be protected. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 1; *Maffet v. Quine*, 95 Fed. 199; *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

But the allegations of damage, actual or exemplary, in such cases, will sustain jurisdiction. *Maffet v. Quine*, 95 Fed. 200; *Von Schroeder v. Brittan*, 93 Fed. 9, 10; *Herbert v. Rainey*, 54 Fed. 248.

In a suit to prevent a permanent injury to land, the value of the land determines amount. *Re Turner*, 119 Fed. 231.

So in a suit for an injunction to restrain diversion of water from plaintiff's land, against several defendants, the injury as a whole to the land, and not the claim for damages against each individual defendant, was the test of the jurisdictional amount. *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 327. See *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73. *Morris v. Bean*, 146 Fed. 423-429, placed the jurisdiction on the value of the right. 123 Fed. 618.

So the owner of a house has a distinct right of property in

streets; and any interference with the right may be enjoined, and the value of the right determines jurisdiction. *American Steel & Wire Co. v. Wire Drawers & D. M. Unions Nos. 1 & 3*, 90 Fed. 608-613.

So in any interference with easements. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 3, and authorities cited.

The owner of a large body of land sought to protect it from stock owners and neighborhood cattle, and the value of the pasturage to be protected, and not the claims against each owner, was the basis of jurisdiction. *Northern P. R. Co. v. Cunningham*, 103 Fed. 708; *Smith v. Bivens*, 56 Fed. 352.

But where property is injured by the overflow of a stream caused by unlawful or negligent construction, the landowners may unite in a suit for injunctive relief, but the injury to each must be of the jurisdictional amount. *Hagge v. Kansas City, S. R. Co.* 104 Fed. 391; *Kenyon v. Knipe*, 46 Fed. 310; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

An injunction was sought to protect the alleged right of plaintiff to import liquors into South Carolina, the right being valued over the value of liquors sought to be imported, the jurisdiction was taken on the value of the right. *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

An injunction having for its object the abatement of a nuisance or removal of an obstruction, the jurisdictional amount is based on the right, and not the amount of damage suffered by the complainant. *American Fisheries v. Lennen*, 118 Fed. 872; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 14 A. & E. Ann. Cas. 8; *Amelia Mill Co. v. Tennessee Coal, Iron & R. Co.* 123 Fed. 811; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782; *Whitman v. Hubbell*, 30 Fed. 81; *Rainey v. Herbert*, 5 C. C. A. 183, 3 U. S. App. 592, 55 Fed. 443.

An injunction to restrain interference with a contract would be the value of the right to be protected, and not the amount involved in the contract; as, enjoining ticket brokers from buying and selling tickets issued by railroads, as before stated, and authorities cited. So in a suit by a property owner and

taxpayer against a city and bidder to prevent a contract, it would be the value of the contract, and not amount of tax, that would give jurisdiction. *Johnston v. Pittsburg*, 106 Fed. 753. See *Murphy v. East Portland*, 42 Fed. 308.

Again, the value of the right to pursue one's business without being subjected to an onerous tax, and a multiplicity of suits for penalties, and not the amount of the illegal tax, fixes the jurisdictional amount for injunction. *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399, 402; *Whitman College v. Berryman*, 156 Fed. 112-114; *Humes v. Ft. Smith*, 93 Fed. 857.

The last cases cited must be differentiated from those where it is apparent that the complainant can sustain no other damage than the payment of the tax, and the amount of the tax must be the basis for jurisdiction, as in *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Eachus v. Hartwell*, 112 Fed. 564; *Purnell v. Page*, 128 Fed. 498; *Turner v. Jackson Lumber Co.* 159 Fed. 923. In the rule under consideration and the cases sustaining it, the injunction sought was to protect a right which was the "matter in dispute," and not the particular tax.

In protecting a business by injunction, past and prospective injury fixes the jurisdictional amount. *Draper v. Skerrett*, 116 Fed. 206; *Evenson v. Spaulding*, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; *Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; *Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor*, 156 Fed. 809; *Board of Trade v. Cella Commission Co.* 76 C. C. A. 28, 145 Fed. 29; *Hunt v. New York Cotton Exch.* 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529, 144 Fed. 511.

So in enjoining a business that parties agreed not to carry on, the value of the right to be protected, and not the loss that may have been occasioned, fixes the jurisdiction. *Ibid.*; *McKee v. Chautauqua Assembly*, 124 Fed. 808-811; *Board of Trade v. Cella Commission Co.* supra.

So, on enjoining infringement of a trademark, the value of the trademark, and not the damage sustained, is the jurisdic-

tional amount. *Hennessey v. Herrmann*, 89 Fed. 669; *De Kuyper v. Witteman*, 23 Fed. 871. See *Winchester Repeating Arms Co. v. Butler Bros.* 128 Fed. 978, holding that the amount of the damages claimed would be the jurisdictional amount. *Symonds v. Greene*, 28 Fed. 834.

CHAPTER XXXIII.

VALUE OF SUBJECT MATTER OR RIGHT IN ISSUE IN SPECIFIC REMEDIES.

Specific Performance.

In a suit to enforce performance of a contract to convey land, the value of the land to be conveyed as alleged fixes the jurisdictional amount, unless fraudulent and fictitious. *Johnston v. Trippe*, 33 Fed. 530. See *Marthinson v. King*, 82 C. C. A. 360, 150 Fed. 49.

Cancellation and Rescission.

In *Simon v. House*, 46 Fed. 317, it is held that a suit brought to cancel certain instruments conveying real estate casting a cloud on title, that the amount considered in determining jurisdiction is the value of the land affected; it is based on the theory that the whole value of the property, the possession and enjoyment of which is imperiled, is involved in the controversy, and not limited to the pecuniary value of the instrument in controversy. *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* 43 Fed. 545. See *Gordon v. Smith*, 10 C. C. A. 516, 23 U. S. App. 451, 62 Fed. 503; and see "Quiet-ing Title." *Stinson v. Dousman*, 20 How. 466, 15 L. ed. 969.

When suit is brought to cancel a mortgage, the amount in dispute is the amount or value which complainant claims to recover, or which defendant will lose if plaintiff recovers. *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53, reversing 96 Fed. 770; *Fidelity & D. Co. v. Moshier*, 151 Fed. 807; *Riggs v. Clark*, 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 560; *Dickinson v. Union Mortgage Bkg. & T. Co.* 64 Fed. 895. But this would not be the rule if complainant owned the whole property and was contesting claims against it, for then the value of the property to be protected would be the

amount in dispute. *Berthold v. Hoskins*, 38 Fed. 772; *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566. See *Cowell v. City Water Supply Co.* *supra*, for distinction drawn by Judge Thayer.

So, to cancel judgments rendered by a court against different defendants, they cannot aggregate the judgments to come within the jurisdiction, no one judgment exceeding two thousand dollars; nor can the value of the real estate upon which the judgments are liens be taken into consideration. *McDaniel v. Traylor*, 123 Fed. 338, reversed in 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Walter v. Northeastern R. Co.* 147 U. S. 373, 37 L. ed. 208, 13 Sup. Ct. Rep. 348. As to amount in canceling a lease, see *Reese v. Zinn*, 103 Fed. 97.

Quieting Title or Removing Cloud.

In quieting title or removing cloud, the amount in dispute is the actual value of the land affected, and not the value of defendant's claim. *Smith v. Adams*, *supra*; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 4; *Shewalter v. Lexington*, 143 Fed. 166; *Greenfield v. United States Mortg. Co.* 133 Fed. 785; *McDaniel v. Traylor*, 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Cowell v. City Water Supply Co.* *supra*; *Union P. R. Co. v. Cunningham*, 173 Fed. 90; *Simon v. House*, 46 Fed. 318; *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* *supra*; *Lovett v. Prentice*, 44 Fed. 459.

In *Cooper v. Preston*, 105 Fed. 403, it is said that a suit to quiet title, against a number of defendants, of land of the jurisdictional value, it must appear that all defendants have a privity of interest derived from a common source of title, or the separate claim of each must be of the jurisdictional amount. *Bates v. Carpentier*, 98 Fed. 452. See *Parker v. Morrill*, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14, as to the value of the interest of plaintiff.

In setting aside a tax title the value of the land, not the tax involved, fixes the jurisdiction. *Felch v. Travis*, 92 Fed. 210. But to enjoin the tax, as we have seen, would be the amount of tax, and not value of land. *Douglas Co. v. Stone*, 110 Fed. 814; *Purnell v. Page*, 128 Fed. 496; *Shewalter v. Lexington*, 143 Fed. 161.

If, however, the suit is against various defendants having distinct claims of title to a parcel of land, then the value of each distinct parcel must exceed two thousand dollars. *Cooper v. Preston*, supra; *Bates v. Carpentier*, 98 Fed. 452; *Stemmler v. McNeill*, 102 Fed. 660. See *Carothers v. McKinley Min. & Smelting Co.* 116 Fed. 947.

The rule that each plaintiff must be competent to sue, and each defendant competent to be sued, is applied (*Ibid.*), but if the interest of the various defendants is undivided and common, though separate as between themselves, the aggregate of the common interest fixes the jurisdiction. *Ibid.*; *Clay v. Field*, 138 U. S. 479, 34 L. ed. 1049, 11 Sup. Ct. Rep. 419.

Dissolution of Partnerships or Corporations.

In the dissolution of a partnership or corporation, it is the value of the estate to be distributed that fixes the jurisdiction (*Kent v. Honsinger*, 167 Fed. 620; *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 449; *Jones v. Mutual Fidelity Co.* 123 Fed. 506; *Towle v. American Bldg. Loan & Invest. Soc.* 60 Fed. 131), and not individual claims of creditor joining in bill (*Ibid.*), provided the claims of all exceed two thousand dollars. It rests upon the fact that while each creditors has a distinct claim, yet they have a common interest in the insolvent estate to be administered in the court, in order to ascertain the amount each shall receive; in a word, they have a joint interest in a controversy involving a fund within the jurisdiction. *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Putnam v. Timothy Dry Goods & Carpet Co.* 79 Fed. 454; *Jones v. Mutual Fidelity Co.* 123 Fed. 514; *Martin v. Rainwater*, 5 C. C. A. 398, 12 U. S. App. 232, 56 Fed. 10; *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96.

Partition Suits.

It is ordinarily true that parties having distinct interests in property cannot join or aggregate the interests to obtain juris-

dictional amounts, yet the representatives of a deceased person bringing suit against an administrator under the same title, and for a common or undivided interest, may obtain jurisdiction on the value of the whole property, and not the value of the interests of each (*Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Prince v. Towns*, 33 Fed. 162), but when two or more heirs sue for their respective interests, and unite to avoid a multiplicity of suits, then the interests of each must exceed two thousand dollars. *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 276; *Walter v. Northeastern R. Co.* 147 U. S. 373, 37 L. ed. 208, 13 Sup. Ct. Rep. 348; *Southern Land & Timber Co. v. Johnson*, 156 Fed. 246; *Parker v. Morrill*, 106 U. S. 2, 27 L. ed. 72, 1 Sup. Ct. Rep. 14.

So where suit is brought to enforce the liability of heirs for debts of a decedent, the distributive share of each heir must exceed two thousand dollars to be suable in the Federal courts. *Busey v. Smith*, 67 Fed. 14. See *McDaniel v. Traylor*, 123 Fed. 339; *Jones v. Mutual Fidelity Co.* 123 Fed. 510, 511.

Suits for an Office.

When the matter in dispute is the deprivation of an office, the salary fixes the amount. *Simon v. House*, *supra*, citing *Smith v. Adams*, 130 U. S. 175, 32 L. ed. 898, 9 Sup. Ct. Rep. 566, and *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

Amounts in Cases Sounding in Damages.

While this branch of the subject is not exactly within equitable cognizance, yet it is useful in discussing Federal jurisdiction based on amount. The general rule is that in suits sounding in damages the damages claimed gives the jurisdiction (*Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Smith v. Greenhow*, 109 U. S. 671, 27 L. ed. 1081, 3 Sup. Ct. Rep. 421; *Von Schroeder v. Brittan*, 93 Fed. 9; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 871; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 594, 595); for the law gives no rule and the demand must furnish it, but, as in other cases, there must be

manifest good faith (*Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 872; *Von Schroeder v. Brittan*, 93 Fed. 10); and the fact that the amount stated is not recovered is not a test, unless the evidence shows that the amount stated was clearly to get jurisdiction (*Bank of Arapahoe v. David Bradley & Co.* supra; *Simon v. House*, 46 Fed. 320), as, where the damages are so trivial as to rebut good faith. *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 290, is an illustrative case. See *Smithers v. Smith*, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297, and *Clement v. Louisville R. Co.* 153 Fed. 979.

Of course, where damages are set up in tort or wilful trespass or personal injuries, it is difficult for a court to decide what a jury may do in giving actual or exemplary damage, and they are therefore not inclined to question the good faith of the claim, or to decide it only colorable. Where the law gives no rule, the demand of plaintiff must furnish one. *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Simon v. House*, 46 Fed. 321; *Hynes v. Briggs*, 41 Fed. 468; *Herbert v. Rainey*, 54 Fed. 251; *Eisele v. Oddie*, 128 Fed. 942.

Exemplary damages claimed in loss of property rights through fraud will not ordinarily be considered; it is only in cases of wilful injury to person or property, or in slander, libel, seduction, false imprisonment, etc. *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 870; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Barry v. Edmunds*, 116 U. S. 562, 29 L. ed. 733, 6 Sup. Ct. Rep. 501.

Again, in action for detention of property, damages to be a part of amount fixing jurisdiction must arise from the detention, and not consequential, as injury to business (*Vance v. W. A. Vandercook Co.* 170 U. S. 480, 481, 42 L. ed. 1115, 1116, 18 Sup. Ct. Rep. 645), or loss of trade and credit (*Ibid.*; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580).

How Amount Alleged in Bill.

The facts upon which jurisdiction rests must always be clearly alleged in the bill, that is, affirmatively appear because

of the limited jurisdiction of the court. *Hagge v. Kansas City S. R. Co.* 104 Fed. 393; *Dupree v. Leggette*, 140 Fed. 776, S. C. 124 Fed. 700; *Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; *Simon v. House*, 46 Fed. 318; *Grace v. American Cent. Ins. Co.* 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Halsted v. Buster*, 119 U. S. 341, 30 L. ed. 462, 7 Sup. Ct. Rep. 276; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873. And the presumption is that the cause is without jurisdiction unless it affirmatively appears in the bill. *Ibid.*; *United States v. Southern P. R. Co.* 49 Fed. 297; *Grace v. American Cent. Ins. Co.* *supra*; *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Adams v. Republic County*, 23 Fed. 212; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 337, 40 L. ed. 448, 16 Sup. Ct. Rep. 307.

With this formula, then, before us in statutory jurisdictional facts, the matter of amount must be shown by allegation to exceed two thousand dollars, exclusive of interest and costs. *Harvey v. Raleigh & G. R. Co.* 89 Fed. 115; *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* 89 Fed. 113. However, in *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806, it is said, that it is not essentially necessary that the amount in controversy should be stated if it appears from the bill, or in any part of the record citing many cases.

Affidavits to Show Amount.

However, if the amount is defectively stated, or in some cases when not stated, as in suits for land when value has been omitted, affidavits have been allowed to show the value to sustain jurisdiction (*Carr v. Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *Robinson v. Suburban Brick Co.* *supra*; *Red River Cattle Co. v. Needham*, 137 U. S. 633, 34 L. ed. 800, 11 Sup. Ct. Rep. 208; *Richmond v. Milwaukee*, 21 How.

391, 16 L. ed. 72), and consequently you may amend the bill in this particular (*Home Ins. Co. v. Nobles*, 63 Fed. 641; *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 305; *Johnston v. Trippe*, 33 Fed. 530; *Re Plymouth Cordage Co.* 68 C. C. A. 434, 135 Fed. 1000-1003; *Thompson v. Automatic Fire Protection Co.* 151 Fed. 945, and cases cited. See *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754, 755); so if amount sufficient, but there was a failure to plead it (*Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 307). See *Bureau of National Literature v. Sells*, 211 Fed. 383.

CHAPTER XXXIV.

HOW ISSUE IS RAISED.

Under the act of 1789 the issue of jurisdiction could only be raised by plea in abatement and proof, where the jurisdiction was properly averred. The court was powerless to dismiss the cause, and could only punish by costs when it was determined in the trial that the jurisdiction had been imposed upon.

By the act of 1875, section 5, Congress provided that in any suit commenced in or removed to the circuit courts of the United States, if it shall appear to the satisfaction of the court that such suit does not *really* and *substantially* involve a *dispute* or *controversy* properly in the jurisdiction of the court, etc., the court shall proceed no further. (See chapter 87.) Simon v. House, 46 Fed. 319; Anderson v. Watt, 138 U. S. 694-701, 34 L. ed. 1078-1081, 11 Sup. Ct. Rep. 449; Oregon R. & Nav. Co. v. Shell, 143 Fed. 1006; Williams v. Notowa, 104 U. S. 212, 26 L. ed. 720; Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; Morris v. Gilmer, 129 U. S. 315-326, 32 L. ed. 690-694, 9 Sup. Ct. Rep. 289; Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 542; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; new Code sec. 37 (Comp. Stat. 1913, sec. 1019); Baum v. Longwell, 200 Fed. 454. The act, as is seen, is mandatory and it should be construed according to its spirit and intent, and it becomes the manifest duty of the Federal courts to protect their jurisdiction from imposition at any stage of the proceeding and whenever made apparent. Ibid.; Bank of Arapahoe v. David Bradley & Co. 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867; Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; Horst v. Merkle, 59 Fed. 503; Terry v. Davy, 46 C. C. A. 141, 107 Fed. 52.

The courts, in construing this statute and applying it, exercise a legal, not a personal, discretion. Mere receiving an impression that a substantial controversy within the jurisdiction of the court is not involved is not sufficient. It must be a legal certainty, and not a personal conviction, created by facts which justify the conclusion. It will be seen that the statute does not prescribe any mode by which it should be made to appear that the jurisdiction has been imposed upon, or how the objection should be interposed. *Wetmore v. Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Morris v. Gilmer*, 129 U. S. 326, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Simon v. House*, *supra*. No doubt the court may from any source be advised or led to suspect imposition, and it may cause the necessary inquiry to be made, and have the issue raised in such form as it may direct (*Ibid.*), and tried as an independent issue (*Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; *Wetmore v. Rymer*, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Terry v. Davy*, *supra*; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 291, 7 A. & E. Ann. Cas. 219; *Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 245, 246); but the evidence must create a legal certainty (*Wetmore v. Rymer*, *supra*); and if the court acts *sua sponte* the plaintiff is entitled to a hearing. (*Hartog v. Memory*, *supra*). The issue is raised by motion or answer under new rule 29.

The trial court is not bound by the pleadings of the parties, and even though the amount may be alleged, yet if from the allegations of the bill it may be determined as a *matter of law* the amount could not be recovered, the court would dismiss. *Holden v. Utah & M. Machinery Co.* 82 Fed. 209. Such was the character of the case just cited, and it was so held on the principle suggested in *Simon v. House*, 46 Fed. 321, and other cases, that the subject-matter may be so far below the allegations of amount as to raise the inference that the statement as made showed knowledge or inexcusable ignorance. *Tennent Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 742; *American Wringer Co. v. Ionia*, 76 Fed. 7; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Levinski v. Middlesex Bkg. Co.* 34 C. C. A. 452, 92 Fed. 463; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 595.

By Motion or Answer.

If, however, the jurisdiction is properly alleged, and it is not apparent that the court has been imposed upon, then you must raise the issue by motion or answer. If raised by motion, and the allegations of the amount are shown not to have been raised in good faith, the bill will be dismissed unless an amendment can be fairly made to bring the case within the jurisdiction, under new rule 28, cl. 2, and rule 19. *Jones v. Rowley*, 73 Fed. 286; *Bank of Arapahoe v. David Bradley & Co. supra*; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477; *Oregon R. & Nav. Co. v. Shell*, 143 Fed. 1005; *Ung Lung Chung v. Holmes*, 98 Fed. 323; *Butters v. Carney*, 127 Fed. 623, see *Ashley v. Presque Isle County*, 27 C. C. A. 585, 54 U. S. App. 450, 83 Fed. 534. But when made in good faith the fact that plaintiff may not be able to recover all he sues for will not affect jurisdiction. *Ibid*.

It is said you can raise the issue of jurisdiction by motion or answer when the absence of jurisdiction is not apparent on the bill. Where you are certain of your proof, and that the motion will be sustained, and that there is no reasonable ground for amendment, then the motion should be interposed, as it presents a single issue to which your evidence can be confined; but if there is a reasonable ground for amendment so as to bring the case within the jurisdiction of the court, then it is best to raise the issue by answer; because, First, if you sustain your plea, and the amendment is made, by which the court retains jurisdiction, you have lost the time in bringing the plea to issue, taking the evidence and trial, which could have been used in bringing the whole case to issue and trial, including the issue of jurisdiction.

Second. Because if your plea is overruled you are left to the mercy of the court.

(a) If you are permitted to answer over, the court may arbitrarily fix the time for answer.

(b) You are debarred from setting up in your answer the matter set up in the plea.

(c) In making your issues by answer you can take the evidence on all the issues in your case, including the issue of jurisdiction, at the same time, and after you strengthen the

from the evidence it seems that the allegations were not made in good faith, then you may by suggestion, or a simple motion in writing, ask the court to dismiss the case; but, as before said, the disclosure must arise out of legitimate evidence on the material issues of the case, and in the absence of a plea or answer raising the issue, the court will not hear direct evidence upon the question of amount. *Wetmore v. Rymer*, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

CHAPTER XXXV.

HOW THE ISSUE IS TRIED.

When the issue is raised as prescribed by rule 29, either party may set down the issue, whether raised by motion or in the answer for hearing in advance of the trial on the merits. By equity rule 6 it may be tried on any motion day, or at any other time, or at any place as the judge may indicate, reasonable notice being given to the opposite party of the time and place of hearing. Rule No. 29 indicates five days as reasonable notice.

If the issue is a part of your answer to the bill, the evidence is taken in connection with the evidence on the merits of the whole bill, and is heard upon the final hearing, or may be submitted in advance of the hearing on the whole case, which is the better practice, and to that end you may set down the issue for hearing, without reference to the merits of the case. *Butters v. Carney*, 127 Fed. 623.

If the issue has not been raised by motion or answer, but the evidence taken shows a want of jurisdiction, as said, you may call the attention of the court to the fact by motion or other suggestion, and use the evidence taken to show it, or if you do not raise the question the court may order the issue made and tried, and it is its duty to do so if the evidence taken shows imposition on the jurisdiction. *Morris v. Gilmer*, 129 U. S. 315-326, 32 L. ed. 690-694, 9 Sup. Ct. Rep. 289; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. In whatever way the issue is raised it should be tried at once, as an independent issue in advance of the merits. *Playford v. Lockard*, 65 Fed. 870; *Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 52, and cases cited; *Ashley v. Presque Isle County*, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed.

55-68; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 291, 292, 7 A. & E. Ann. Cas. 219.

By Affidavits.

The practice of permitting affidavits to be filed in the Supreme Court to show jurisdiction arose from instances of accidental omission of allegation in the pleadings, and no issue of value raised in the court below. If there was a real controversy as to value, it must be settled in the first instance and upon notice and trial. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Red River Cattle Co. v. Needham*, 137 U. S. 635, 34 L. ed. 800, 11 Sup. Ct. Rep. 208; *Carr v. Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *Rector v. Lipscomb*, 141 U. S. 558, 559, 35 L. ed. 857, 858, 12 Sup. Ct. Rep. 83. See *Talkington v. Dumbleton*, 123 U. S. 745, 746, 31 L. ed. 313, 314, 8 Sup. Ct. Rep. 335; *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806; *Greene County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 803, and cases cited; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540. In *Wilson v. Blair*, 119 U. S. 387, 30 L. ed. 441, 7 Sup. Ct. Rep. 230, it was declared to be good practice for the circuit court to allow affidavits and counter-affidavits in determining amount for appeal. *Davie v. Heyward*, 33 Fed. 95; *Morris v. Gilmer*, 129 U. S. 326, 32 L. ed. 694, 9 Sup. Ct. Rep. 289.

In *Talkington v. Dumbleton*, 123 U. S. 745, 31 L. ed. 313, 8 Sup. Ct. Rep. 335, the court states the result of all the cases, as to permitting affidavits to show the jurisdiction of the Supreme Court, as follows:

First. When demand not for money, and the value of the thing demanded is required to be stated, you cannot vary by affidavits the statement as made. *Green County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 803.

Second. Nor when evidence is offered below on the question of value.

Third. But when an appeal is taken without any question of value, and it is nowhere disclosed in the record, affidavits will be heard. (Authorities above.)

Burden of Proof.

The burden is on the defendant, when raised by motion or answer. *Butters v. Carney*, 127 Fed. 622; *contra*, *Oregon R. & Nav. Co. v. Shell*, 143 Fed. 1005.

CHAPTER XXXVI.

AMENDING TO SHOW JURISDICTION.

Having now discussed the fundamental grounds of Federal jurisdiction, and when, where, and how it must be shown, as well as how the issue, if any, is to be made and tried, I will now briefly speak of the right of amendment of jurisdictional allegations. We have just said one may amend his bill to show jurisdiction as to amount, where the facts warrant the exercise of jurisdiction. *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754, 755; *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 307; *Carnegie, P. & Co. v. Hulbert*, 16 C. C. A. 498, 36 U. S. App. 81, 70 Fed. 218; *Weller v. Hanaur*, 105 Fed. 194; *Davis v. Kansas City, S. & M. R. Co.* 32 Fed. 863; *Re Plymouth Cordage Co.* 68 C. C. A. 434, 135 Fed. 1003. And when an amendment is necessary, the jurisdiction is established from the beginning of the suit, and not date of amendment. *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754; *Betzoldt v. American Ins. Co.* 47 Fed. 707. And this rule applies to any jurisdictional allegation that can be amended, as, where an allegation that a plaintiff is a citizen of a State, when in fact he was an alien, upon which *status* the jurisdiction depended; plaintiff may amend his pleading and allege he was an alien when the action was brought. *Grove v. Grove*, 93 Fed. 865; *Woodridge v. McKenna*, 8 Fed. 679; *Glover v. Shepperd*, 11 Biss. 572, 15 Fed. 838; *Thompson v. Automatic Fire Protection Co.* 151 Fed. 945. Or where there is a failure to give the residence of the parties, it may be amended on motion without delay. *Harvey v. Richmond & M. R. Co.* 64 Fed. 20; *Riggs v. Brown*, 172 Fed. 637. See act of March 3d, 1915, sec. 274 (c) Judicial Code.

So you may strike out by amendment the name of a party not indispensable, if the presence of such party affects the

jurisdiction,—as, when it is necessary to create diversity of citizenship. *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 89; *Grove v. Grove*, 93 Fed. 867; new rule 39; *Hayne v. Old Dominion Co.* 204 Fed. 682; *St. Louis Independent Packing Co. v. Houston*, 132 C. C. A. 65, 215 Fed. 557 bot.

In *Weller v. Hanaur*, 105 Fed. 193, it was sought after the trial to amend to get jurisdiction by setting up assignment of the interest of one party plaintiff to the other so as to create the diversity of citizenship necessary, but the court refused to permit it, on the ground that the jurisdiction must have existed when the suit was filed or tried.

So amendments of this character cannot be made on appeal, but the appellate court will reverse where the record is defective in its jurisdictional allegations, and remand the cause for amendment in this respect. *Preferred Acci. Ins. Co. v. Barker*, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814; *Van Doren v. Pennsylvania Co.* 35 C. C. A. 282, 93 Fed. 272, and cases cited; *Grove v. Grove*, supra; *Metcalf v. Watertown*, 128 U. S. 590, 32 L. ed. 544, 9 Sup. Ct. Rep. 173..

See act March 3d, 1915, allowing amendments after appeal to show diversity of citizenship to sustain jurisdiction. *Thomas v. Anderson*, 138 C. C. A. 405, 223 Fed. 42, where under equity rule 27 the jurisdictional facts are required to be alleged and sworn to, a failure to allege them as required cannot be amended. *Dickinson v. Consolidated Traction Co.* 114 Fed. 242, 243. As to allegations under the rule see *Russell v. Shippen Bros. Lumber Co.* 224 Fed. 255.

However, see new rule 19, permitting the court in furtherance of justice to amend any process, proceeding, pleading, or record, and requiring the court to disregard at every stage of the proceeding errors or defects which do not affect the substantial rights of parties, giving an illimitable scope to the exercise of the discretion of the court in granting amendments at any stage of a case. See act March 3d, 1915, permitting amendments at any stage of proceedings to obviate the objection that the suit was not brought on the right side of the court.

CHAPTER XXXVII.

JURISDICTION BY ASSIGNMENT.

Section 11 of the judiciary act of 1789 provided as follows: "Nor shall any circuit or district court have cognizance of any suits to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made. *Except* in cases of foreign bills of exchange." This restriction over assigned claims was intended to prevent the creation of jurisdiction by simply assigning choses in action to a citizen of another State. *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Davis v. Mills*, 99 Fed. 40, and cases cited; *Tierney v. Helvetia Swiss F. Ins. Co.* 163 Fed. 82; *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 113, 75 C. C. A. 1, 145 Fed. 506; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 206-208, 39 L. ed. 674, 675, 15 Sup. Ct. Rep. 563; *Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561; *Stimson v. United Wrapping Mach. Co.* 156 Fed. 298, 299; *Bolles v. Lehigh Valley R. Co.* 127 Fed. 884; *Ferguson v. Consolidated Rubber Tire Co.* 169 Fed. 888, and cases cited; *Dulles v. H. D. Crippen Mfg. Co.* 156 Fed. 708; *Gorman-Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 365, and cases cited; *State Nat. Bank v. Eureka Springs Water Co.* 174 Fed. 828. However where the court has jurisdiction of one claim it may determine the whole matter though other claims sued on were assigned to the plaintiff by persons that could not sue. *Howe & D. Co. v. Hangan*, 140 Fed. 183.

The act of 1875 provided: "No circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." *Ibid.*; *Tredway v. Sanger*, 107 U. S. 324, 27 L. ed. 582, 2 Sup. Ct. Rep. 691; *Emsheimer v. New Or-*
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leans, 186 U. S. 43, 46 L. ed. 1046, 22 Sup. Ct. Rep. 770, S. C. 56 C. C. A. 189, 119 Fed. 1019; Glass v. Concordia Parish, 176 U. S. 209, 44 L. ed. 437, 20 Sup. Ct. Rep. 346.

By the act of 1888, now in force, the language was somewhat changed as follows: "Nor shall any district or circuit court of the United States have cognizance of any suits, except on foreign bills of exchange, to recover the contents of any promissory notes, or other choses in action in favor of any assignee, or of any subsequent holder, if such instrument be *payable to bearer*, and be *not made by any corporation*, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." U. S. Rev. Stat. § 629. Embodied in new Code, sec. 24 (Comp. Stat. 1913, § 991) (appendix).

The act means that a district court of the United States shall not have jurisdiction over a suit by an assignee of a promissory note, or other chose in action (except a foreign bill of exchange), unless the suit could have been maintained on the instrument in said court before the assignment; and that a subsequent holder of a promissory note, or other chose in action, "payable to bearer" (except a foreign bill of exchange, or an instrument made by a corporation), cannot sue in the circuit court of the United States unless the suit might have been brought upon such instrument in said court before the transfer was made to the subsequent holder.

Thus we see that Federal courts have not jurisdiction of a suit brought by the assignee of a promissory note, or chose in action, when the assignor could not have maintained it in said court, when the suit was brought. Troy Bank v. Whitehead, 184 Fed. 932; Watterman v. Chesapeake & O. R. Co. 199 Fed. 667, and cases cited; Cincinnati, H. & D. R. Co. v. Orr, 215 Fed. 262; Emsheimer v. New Orleans, 186 U. S. 44, 46 L. ed. 1047, 22 Sup. Ct. Rep. 770; Noyes v. Crawford, 133 Fed. 796; Jones v. Shapurn, 57 Fed. 457; New Orleans v. Benjamin, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905, 71 Fed. 758; Sullivan v. Ayer, 174 Fed. 199; Skinner v. Barr, 77 Fed. 816. When the original beneficial owner could sue in the Federal courts, then the assignee can sue though the nominal payee could not, by reason of his citizenship. Kirvin v. Virginia-Carolina Chemical Co. 76 C. C. A. 172, 145 Fed. 290, 7 A. & E. Ann.

Cas. 219, and cases cited. It is not necessary that the assignor should have been a resident of the assignee's district in which the suit is brought. *Stinson v. United Wrapping Mach. Co.* 156 Fed. 298. See *Dulles v. H. D. Crippen Mfg. Co.* 156 Fed. 706, and *Ferguson v. Consolidated Rubber Tire Co.* supra; *Cincinnati, H. & D. R. Co. v. Orr*, 215 Fed. 261.

The clause, "if such instrument be payable to bearer, and be not made by a corporation," operates as an exception to the general rule, and gives jurisdiction to assignees, when the instrument is made by a corporation, and payable to bearer, that is, negotiable by mere delivery.

So an assignee of a foreign bill of exchange, or promissory notes "payable to bearer," executed by corporations, may sue in the Federal courts unrestricted by this section of the judiciary act. *Newgass v. New Orleans*, 33 Fed. 196; *Rollins v. Chaffee County*, 34 Fed. 91; *Wilson v. Knox County*, 43 Fed. 481; *Steel v. Rathbun*, 42 Fed. 390; *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694.

With these exceptions, all choses in action which required an assignment to give a right of action, and promissory notes payable to bearer and passing by delivery, are within the act. *Ibid.*

Effect of Reassignment.

If original assignor could sue, the fact the note has been re-assigned by one who could not, by reason of his citizenship, sue in the Federal court, would not affect right of the original assignor to sue in the Federal courts. *Moore Bros. Glass Co. v. Drevet Mfg. Co.* 154 Fed. 737. Objection to the jurisdiction, that it does not appear that the assignor could sue in the Federal courts can be raised at any time. *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 117.

What Are Choses in Action Within the Statute?

In determining what is included in the words "choses in action," as used by the statute, it was early stated that the words comprehended all causes of action that could be equitably or legally assigned. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201-206, 39 L. ed. 672-674, 15 Sup. Ct. Rep. 563; and *Utah-*

Nevada Co. v. De Lamar, 66 C. C. A. 179, 133 Fed. 119-123, review the cases construing the several acts of 1789, 1875, and 1888. Gorman-Wright Co. v. Wright, 67 C. C. A. 345, 134 Fed. 364; Brown v. Beacon, 174 Fed. 814, 815; Jackson & S. Co. v. Pearson, 60 Fed. 117; Farr v. Hobe-Peters Land Co. 110 C. C. A. 160, 188 Fed. 10.

It will be seen by these cases that the words include all character of contracts, covenants, and promises which confer the right to recover a personal chattel, or sum of money, except when transferred by operation of law. Assignments by operation of law creating legal representatives are not within the statute. *Ibid.*

In Mexican Nat. R. Co. v. Davidson, 157 U. S. 201-209, 39 L. ed. 672, 15 Sup. Ct. Rep. 563, the court holds that the words, "if the instrument be payable to bearer, and be not made by a corporation," did not limit the comprehensiveness of the words "choses in action," as construed above. *Ibid.*; Sheldon v. Sill, 8 How. 449, 12 L. ed. 1151; Ban v. Columbia Southern R. Co. 54 C. C. A. 407, 117 Fed. 21; Coler v. Grainger County, 20 C. C. A. 267, 43 U. S. App. 252, 74 Fed. 21, 22; Corbin v. Black Hawk County, 105 U. S. 664, 665, 26 L. ed. 1138; Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co. 152 U. S. 77, 38 L. ed. 360, 14 Sup. Ct. Rep. 483; Shoecraft v. Bloxham, 124 U. S. 735, 31 L. ed. 576, 8 Sup. Ct. Rep. 686; Ambler v. Eppinger, 137 U. S. 482, 34 L. ed. 766, 11 Sup. Ct. Rep. 173; Bertha Zinc & Mineral Co. v. Vaughan, 88 Fed. 569, 570.

"Choses in action" do not include rights of action founded on a wrongful act or neglect of duty causing damages, but are limited to suits founded upon contracts containing within themselves some promise or duty to be performed. *Ambler v. Eppinger*, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. 178; *Muller v. Chicago, I. & L. R. Co.* 149 Fed. 940.

Illustrations.

A parol contract falls within the words "choses in action." *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 120. So does an assignment of a lease. *Brooks v. Laurent*,

39 C. C. A. 201, 98 Fed. 651; See *Adams v. Shirk*, 44 C. C. A. 653, 105 Fed. 659-663. So does a judgment. *Walker v. Powers*, 104 U. S. 248, 26 L. ed. 730; *Mississippi Mills v. Cohn*, 150 U. S. 208, 37 L. ed. 1054, 14 Sup. Ct. Rep. 75; *Metcalf v. Watertown*, 128 U. S. 588, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. See *Hulthberg v. Anderson*, 170 Fed. 657, for exception. So does a contract for specific performance. *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. ed. 136; *Shoecraft v. Bloxham*, 124 U. S. 735, 31 L. ed. 576, 8 Sup. Ct. Rep. 686. And a contract to convey land. *Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co.* 152 U. S. 76, 38 L. ed. 360, 14 Sup. Ct. Rep. 483. It includes non-negotiable instruments also. *Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561. So in a suit to foreclose a mortgage. *Hoadley v. Day*, 128 Fed. 302; *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377, 26 Sup. Ct. Rep. 220; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376. But not to a purchaser under foreclosure seeking to remove cloud. *Hobe-Peters Land Co. v. Farr*, 170 Fed. 644.

A claim for overcharge in freight was held not to come within the statute. *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. 177; *Edmunds v. Illinois R. Co.* 80 Fed. 78. So, a nonresident assignee of a share in an estate, who sues the administrator on his bond, is not an assignee of a chose in action. *Bertha Zinc & Mineral Co. v. Vaughan*, 88 Fed. 566. So, a suit by an assignee to force a transfer of stock is not within the statute. *Jewett v. Bradford Sav. Bank & T. Co.* 45 Fed. 802. A purchaser under a decree of foreclosure is not an assignee within the statute. *Portage City Water Co. v. Portage*, 102 Fed. 769; *Hobe-Peter Land Co. v. Farr*, *supra*.

Having seen what character of obligations are included in the words "choses in action," I will now illustrate by cases the jurisdiction of the Federal court as limited by the first section of the act of 1888.

In *Newgass v. New Orleans*, 33 Fed. 196, the statute was construed shortly after its passage in 1887, and it was held that when the transfers of "choses in action" required an assignment, the court had no jurisdiction of a suit by the assignee, if the assignor could not sue in the Federal court; and where transfers were made by delivery, the obligation being paid to

bearer, such choses in action were also excluded unless made by a corporation, and the statute was construed as follows:

(a) When suits were on foreign bills of exchange.

(b) When suits were such that the original payee in the instrument could sue in the Federal courts.

(c) When suits were upon "choses in action" payable to bearer, executed by a corporation, then such suits could be brought in the Federal court; otherwise a Federal court had no jurisdiction of a suit brought by an assignee. The construction was followed in *Rollins v. Chaffee County*, 34 Fed. 91; *Wilson v. Knox County*, 43 Fed. 481, and approved by the Supreme Court in *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329, 92 Fed. 695; *Laird v. Indemnity Mut. M. Assur. Co.* 44 Fed. 712; *Bank of British N. A. v. Barling*, 46 Fed. 357; *Thompson v. Searcy County*, 6 C. C. A. 674, 12 U. S. App. 618, 57 Fed. 1036.

In *Holmes v. Goldsmith*, 147 U. S. 156, 37 L. ed. 120, 13 Sup. Ct. Rep. 288, a note was made by a citizen of Oregon and payable to a citizen of Oregon, it seems for accommodation. The payee discounted the note in New York, and the New York parties sued in the Federal courts of Oregon. Court held jurisdiction in the case, but placed it on the ground that the note being made for the accommodation of the indorser, he was in legal effect the maker, and had no cause of action against the maker, and was not an assignor of a cause of action within the meaning of the statute. But, as stated before, the section of the act was intended to prevent assignments by citizens of the same State with the debtor, so as to give jurisdiction to Federal courts. *New Orleans v. Benjamin*, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905; *Brigham-Hopkins Co. v. Gross*, 107 Fed. 770; *Chase v. Sheldon Roller-Mills Co.* 56 Fed. 625. See *South Dakota v. North Carolina*, 192 U. S. 287, 48 L. ed. 448, 24 Sup. Ct. Rep. 269, holding a citizen of one State can assign to his State bonds of another State, and suit may be brought by the assignee State in the Supreme Court of the United States, but this is a clear evasion of the 11th Amendment to the Constitution of the United States, as shown by the dissenting opinion of Mr. Justice White, pp. 329 *et seq.*

CHAPTER XXXVIII.

PROMISSORY NOTES PAYABLE TO BEARER MADE BY CORPORATIONS.

The evident purpose of this provision of the act was to retain jurisdiction in the Federal courts of a large class of securities made by corporations which are sold in open market and pass by delivery. *Wilson v. Knox County*, *supra*.

Municipal bonds payable to, or order, and originally sold to a citizen of Iowa, from whom the plaintiff, a citizen of New Hampshire, purchased them, were held in legal effect payable to bearer (*Independent School Dist. v. Hall*, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 371; *Reynolds v. Lyon County*, 97 Fed. 155), and, being executed by a corporation, were within the jurisdiction of a Federal court. *Lyon County v. Keene Five Cent Sav. Bank*, 40 C. C. A. 391, 100 Fed. 337; *Citizens' Sav. Bank v. Newburyport*, 95 C. C. A. 232, 169 Fed. 766; *Lake County v. Dudley*, 173 U. S. 243-250, 43 L. ed. 684-687, 9 Sup. Ct. Rep. 398; *Gambee v. Rural Independent School Dist.* 132 Fed. 514. *Contra Thomson v. Elton*, 100 Fed. 145; *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694.

In *Quinlan v. New Orleans*, 92 Fed. 695, it is held that if the proper diversity of citizenship exists, the holder of a note payable to bearer, executed by a corporation, may sue in the Federal courts, but not so if not payable to bearer. *New Orleans v. Quinlan*, 173 U. S. 192, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Cloud v. Sumas*, 52 Fed. 177; *Loeb v. Columbia Twp.* 179 U. S. 485, 486, 45 L. ed. 288, 289, 21 Sup. Ct. Rep. 174.

You see, a distinction is made between bonds and notes, executed by a corporation, payable to bearer, and *not* payable to bearer; only those *payable to bearer* can be sued upon by an assignee, whether the assignor could sue or not; that is, it is

not necessary to show diversity of citizenship between the original parties to the instrument in order for an assignee to maintain the suit in a Federal court. See *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 530, 531; *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 462.

In *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905, suit was brought upon warrants executed by a corporation, payable to the order of a certain person, and other warrants simply stating an indebtedness to certain persons, not being payable to bearer. The Supreme Court held the assignee must show the assignor could sue in a Federal court.

In *Thomson v. Elton*, 100 Fed. 145, it was held that the holder of a municipal bond payable to a person named, or order, and indorsed in blank, could only maintain an action in the Federal court when payee could do so, as the title comes through him. However, though bonds cannot be sued upon, you may sue on coupons payable to bearer. *Independent School Dist. v. Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 2; *Reynolds v. Lyon County*, supra. But in *Lyon County v. Keene Five-Cent Sav. Bank*, supra, the court held that a municipal bond payable to, or order, is in legal effect payable to bearer and within the exception made by the statute, it having been executed by a corporation. *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 523.

In *Loeb v. Columbia Twp.* 91 Fed. 37, townships issued bonds; held issued by a corporation, so that assignee may sue. *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 689.

In *Wilson v. Knox County*, 43 Fed. 481, held, county warrants not payable to bearer must show original payee could sue. See *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694. Citizens of another State brought suit on coupons payable to bearer purchased after detached. Held, their right to sue in the Federal court was not affected by the citizenship of the holder of the bonds, though payable to citizens of the county. *Reynolds v. Lyon County* and *Independent School Dist. v. Rew*, supra; *Edwards v. Bates County*, 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. Rep. 967; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746. County warrants payable "to bearer" can be sued in the Federal courts by assignee if nonresident. *Kearny County v. McMaster*, 15

C. C. A. 353, 32 U. S. App. 367, 68 Fed. 177; Kearny County v. Irvine, 126 Fed. 694. Coupons also are primary causes of action. Ibid.

Of course, a fictitious transfer of bonds or coupons to obtain jurisdiction would be a fraud on the court. Bernard Twp. v. Stebbins, 109 U. S. 355; Hartford F. Ins. Co. v. Erie R. Co. 172 Fed. 902, and cases cited; Kreider v. Cole, 79 C. C. A. 339, 149 Fed. 647; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311. See Bernheim v. Birnbaum, 30 Fed. 885; Lake County v. Dudley, 173 U. S. 251, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 335, 40 L. ed. 447, 16 Sup. Ct. Rep. 307; Waite v. Santa Cruz, 184 U. S. 326, 46 L. ed. 567, 22 Sup. Ct. Rep. 327; Williams v. Nottawa, 104 U. S. 212, 213, 26 L. ed. 720, 721. But assignment without consideration, for purposes of suit, would not be collusive if the assignor could have brought suit. Hartford F. Ins. Co. v. Erie R. Co. 172 Fed. 899-902. See Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427, and cases cited.

The rule above applies to removals, as well as causes originally brought in the Federal courts. Mexican Nat. R. Co. v. Davidson, 157 U. S. 205, 39 L. ed. 674, 15 Sup. Ct. Rep. 563.

History of the Assignment Clause in Act of 1888.

Having stated the rule of jurisdiction as affected by assignments of choses in action, I will give a brief history of this clause in the act of 1888, sec. 1, as it will enable you to better understand the construction given it, and in a measure account for conflicting decisions in the Federal courts.

Section 1 of the act of 1789 provided that the assignee of the instruments named could not recover the contents of any such instruments, unless the original payee could sue in the Federal courts; that is, unless there existed a diversity of citizenship between the maker and payee; but foreign bills of exchange were excepted. Between 1789 and 1875 there are numerous decisions construing the clause.

First. We find the words, "assignee of a promissory note or other causes of action," strictly construed, and instruments payable to bearer, or to a named person, excepted from the rule,

because the instrument was not technically assigned, but passed by simple delivery. *Thompson v. Perrine*, 106 U. S. 593, 27 L. ed. 300, 1 Sup. Ct. Rep. 564, 568; *Adams v. Republic County*, 23 Fed. 213; *New Orleans v. Quinlan*, *supra*; *Jerome v. Rio Grande County*, 5 McCrary, 639, 18 Fed. 874; *Chickaming v. Carpenter*, 106 U. S. 666, 27 L. ed. 308, 1 Sup. Ct. Rep. 620.

Second. We find an indorsee could sue his immediate indorser if diversity of citizenship existed between them, and without reference to the citizenship of the immediate parties to the instrument, because the claim was derived through a new contract, and not through an assignment. *Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 912, and cases cited.

Third. Many cases drew the distinction between the recovery of the "contents" of a note or other chose in action, and the recovery of the notes or instruments themselves (but this language is retained in the act of 1888, and will be noticed hereafter). *Deshler v. Dodge*, 16 How. 631, 14 L. ed. 1088; *New Orleans v. Benjamin*, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905; *Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co.* 152 U. S. 76, 38 L. ed. 360, 14 Sup. Ct. Rep. 483; *Shoecraft v. Blaxham*, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686.

March 3, 1875, Congress, with a view of increasing the jurisdiction of the Federal courts, excepted from the rule notes negotiable by the law merchant, as well as bills of exchange, leaving out the word "foreign" before bills of exchange, in the act of 1789. Here all the bars to entering Federal courts were let down as to commercial paper, and exceptions evolved out of the act of 1789 in the various decisions became of no importance whatever. *Tredway v. Sanger*, 107 U. S. 323, 27 L. ed. 582, 2 Sup. Ct. Rep. 691; *New Orleans v. Quinlan*, *supra*; *Mersman v. Werges*, 112 U. S. 143, 28 L. ed. 643, 5 Sup. Ct. Rep. 65.

In 1888 Congress, with a view of restricting again the jurisdiction of the Federal courts, changed the whole clause so as to read, "Nor shall any circuit or district court have cognizance of any suits (except upon foreign bills of exchange) to recover the contents of any promissory note, or other chose in action,

in favor of any assignee or of *any subsequent holder*, if such instrument be *made payable 'to bearer'* and be *not made by any corporation*, unless the suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The italicized words show the difference between the acts of 1789 and 1888. It appears then—

(a) That the word "foreign" was restored, as in the act of 1789, before "bills of exchange." *Morgan v. Gay*, 19 Wall. 81, 22 L. ed. 100.

(b) That a note excluded by construction from the act of 1789 was now expressly included in the act of 1888, unless made by a corporation.

(c) That the word "transfer" was evidently intended to enlarge the scope given by the construction to the word "assignee," under the act of 1789, and was intended to cover every case in which title to negotiable paper, the contents of which might be the subject of suit, had vested by acts of parties or by operation of law.

(d) That the exception made under the act of 1789, by which an indorsee could sue his immediate indorser, if diversity of citizenship existed, was abrogated by the act of 1888.

There being no question about the proposition (a), I will now examine a few cases illustrating the propositions designated by (b), (c), and (d).

Proposition (b) has been fully illustrated in discussing "promissory notes payable to bearer made by corporations."

Proposition (c), relating to the intention of Congress in using the word "transfer" in the act of 1888. There is no question that the word so used was intended to enlarge the scope of the word "assignee," and to cover all methods, whether by acts of parties or operation of law, by which title to choses in action passed, and to annul the construction given to the word "assignment" under the act of 1789. *United States Nat. Bank v. McNair*, 56 Fed. 326, 327.

Under proposition (d), the construction given to the act of 1789, whereby an assignee could sue his immediate assignor if diversity of citizenship existed, was abrogated by the act of 1888. The language of the act of 1888 clearly shows the mind of Congress to place the right of suit by the *assignee*, or *subsequent holder*, upon the citizenship existing between the maker

and the payee of the instrument assigned; that is, the assignee of a chose in action under the present act, or any subsequent holder of the assigned instrument, cannot sue in the Federal courts unless such suit might have been maintained between the original parties to the instrument, or, as stated in the act, "as if no assignment or transfer had been made. *Portage City Water Co. v. Portage*, 102 Fed. 769; *Emsheimer v. New Orleans*, 116 Fed. 893; *Utah-Nevada Co. v. De Lamar*, 133 Fed. 119. But if suit could be maintained between original holders, then citizenship of intermediate assignees is not important.

In *Skinner v. Barr*, 77 Fed. 816, a note was executed by one Price to Knap, and indorsed by one Barr, all of Pennsylvania. One Skinner, of New Jersey, became the assignee, and sued Barr in the Federal court. Held, the original payee not being able to sue in the Federal court, Skinner could not sue there. *United States Nat. Bank v. McNair*, 56 Fed. 325.

In *Superior v. Ripley*, 138 U. S. 96, 97, 34 L. ed. 916, 11 Sup. Ct. Rep. 288, it was held that a draft drawn by a citizen of a State on a corporation of the same State, but in favor of a citizen of another State, does not come within the statute, for at the moment of acceptance the acceptor becomes the primary debtor, and it is a new contract between the acceptor and non-resident, and the latter may sue without tracing title through the drawer.

In note payable "to order" and transferred, assignee cannot sue in a Federal court unless the assignor could. *United States Nat. Bank v. McNair*, 56 Fed. 324; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912. See *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 462. And the record must show that the suit could have been maintained in the name of the assignor when brought. *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *Dexter H. & Co. v. Sayward*, 84 Fed. 300; *United States Nat. Bank v. McNair*, 56 Fed. 327. So an assignee of a State judgment depends for jurisdiction on the citizenship of the assignor (*Mississippi Mills v. Cohn*, 150 U. S. 208, 37 L. ed. 1054, 14 Sup. Ct. Rep. 75), and so as to all non-negotiable instruments (*Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561; *Holmes v. Goldsmith*, 147 U. S. 157, 37 L. ed. 120, 13 Sup. Ct. Rep. 288; *Wilson v. Knox*

County, 43 Fed. 482). So when assigned by partnership by one partner. *Ban v. Columbia Southern Co.* 54 C. C. A. 407, 117 Fed. 21, U. S. Rev. Stat. 629, reversing 109 Fed. 499. So a trustee as assignee of a contract between citizens of same State cannot sue. *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552, 48 C. C. A. 608, 109 Fed. 676; *American Waterworks & Guarantee Co. v. Home Water Co.* 115 Fed. 171.

How Assignments Alleged in Bill.

If the citizenship of the original payee is material to the jurisdiction it is essential to show it in the bill. Act 1888, sec. 1; *Holmes v. Goldsmith*, supra; *Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 912; *Benjamin v. New Orleans*, 169 U. S. 163, 42 L. ed. 702, 18 Sup. Ct. Rep. 298; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 268, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869; *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *United States Nat. Bank v. McNair*, 56 Fed. 324; *Dexter, H. & Co. v. Sayward*, supra, and cases cited. And the citizenship must be distinctly alleged and not inferentially. Thus an allegation by an assignee, that each of said persons, etc., are now and were, on the day of, citizens of States other than the State of, and competent to maintain suit, as if no such assignment had been made, is insufficient to confer jurisdiction; must state citizenship of each party. *Benjamin v. New Orleans*, 20 C. C. A. 591, 41 U. S. App. 178, 74 Fed. 417, 71 Fed. 758.

So in an action on claims aggregating the jurisdictional amount, which have been acquired by assignment, the bill must show the citizenship of the assignors; and the same rule applies in removals. *Murphy v. Payette Alluvial Gold Co.* supra; *Davis v. Mills*, 99 Fed. 39-41; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 269, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869; *Fife v. Whittell*, 102 Fed. 539, 540.

You cannot amend after removal to show it. *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Graves v. Corbin*, 132 U. S. 590, 591, 33 L. ed. 468, 469, 10 Sup. Ct. Rep. 196.

Subsequent Changes.

Subsequent changes are not considered if jurisdiction existed when the suit was brought. *Emsheimer v. New Orleans*, 116 Fed. 893, 186 U. S. 44, 46 L. ed. 1047, 22 Sup. Ct. Rep. 770; *Jones v. Shapira*, 57 Fed. 457. Citizenship of subsequent holders not considered. *Ibid.*

Assignment Must Be Genuine.

The assignment must not be colorable, and when it is a suit at law, jury may pass upon it if evidence conflicting. Act 1888, sec. 5; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Lake County v. Schradsky*, 38 C. C. A. 17, 97 Fed. 1; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Lake County v. Dudley*, 173 U. S. 253, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Crawford v. Neal*, 144 U. S. 593; *Waite v. Santa Cruz*, 184 U. S. 325; *Morris v. Gilmer*, 129 U. S. 327.

How the Issue is Raised.

When the assignor not entitled to sue, defendant may dismiss. *Ibid.*; *Farmington v. Pillsbury*, 114 U. S. 144; *Wetmore v. Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Defiance Water Co. v. Defiance*, 191 U. S. 194, 48 L. ed. 144, 24 Sup. Ct. Rep. 63.

The issue is raised by motion or answer, and if the diversity of citizenship to give the court jurisdiction after the assignment is not apparent, it may be raised by motion in the nature of a demurrer to the petition as follows:

In District Court of &c.

Title as before given in motion to dismiss for want of jurisdiction—

Because it appears from said bill that the diversity of citizenship to sustain the jurisdiction of this court is sought through the assignment of the cause of action to complainant; and it does not appear that E. F. the assignor was a citizen of a different State than that in which the suit is brought, and that he was competent to maintain the suit in this court if no such assignment had been made.

or if it appears from the bill that the allegations of jurisdiction are sufficient but in fact not true then use the following form:

It appears from said bill that the diversity of citizenship to sustain the jurisdiction of this court is sought through the assignment of the (cause of action) to complainant, and that so much of the allegation of said bill as avers that E. F., the payee and assignor, through whom complainant derives title, was a citizen of the State of is not true, for defendant avers that he was at the time of the execution and delivery of the (cause of action), and is now, a citizen of the State of....., and not of the State of, as alleged in the bill, and that no diversity of citizenship on which to base the jurisdiction of this court exists in this suit. All of which matters and things this defendant avers to be true, and pleads the same in bar of complainant's said bill.

Wherefore defendant prays the judgment of the court whether he shall answer further, and asks to be dismissed hence with his cost.

R. F.,
Solicitor, etc.

If the jurisdiction is based on the fact that it is alleged the instrument was executed by a corporation and payable to bearer, and you wish to raise the issue by plea or answer, use the same form *mutatis mutandis*. You must deny specifically that it was executed by a corporation, or that the chose in action is payable to bearer. If raised in answer you may use the same form of allegation.

CHAPTER XXXIX.

PARTIES.

I have now discussed so much of the general and territorial jurisdiction of the circuit courts of the United States as is necessary to be known in order to intelligently prepare a bill in a Federal equity suit. It is only a general treatment of the subject, but my purpose is to stimulate and direct your investigation along lines that will lead to correct conclusions, as to whether you have jurisdiction under the Constitution and laws of the United States, and, having determined that fact, then to correctly state it in your bill.

In what has been already said, it is seen that Federal jurisdiction depends largely upon who are to be parties to the bill, for the Federal statutes create limitations on Federal jurisdiction over parties. *Bland v. Fleeman*, 29 Fed. 672. I will therefore now discuss parties generally, and how they are affected by the limitation created by Federal laws, and the rules of equity.

It is a cardinal principle in courts of equity generally, that all persons interested in a suit, or to be affected by the results, should be made parties (*ibid.*; *Minnesota v. Northern Securities Co.* 184 U. S. 199, 235, 46 L. ed. 499, 515, 22 Sup. Ct. Rep. 308; *Stevens v. Smith*, 61 C. C. A. 624, 126 Fed. 711; *Weidenfeld v. Northern P. R. Co.* 63 C. C. A. 537, 129 Fed. 311; *Arkansas, Southeastern R. Co. v. Union Sawmill Co.* 83 C. C. A. 224, 154 Fed. 304; *Golden v. Bruning*, 72 Fed. 4); either plaintiff or defendant (*ibid.*) because it is the aim of courts of equity to do complete justice, and to settle the rights of all parties interested in the subject-matter in *one* suit, in order that litigation may end, and a multiplicity of suits be avoided (*ibid.*; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 86; *Mackay v. Gabel*, 117 Fed. 878; *Oberlin College v. Blair*, 70 Fed. 419).

New rule 37 embodies this principle in setting forth who should be made plaintiffs and defendants in a cause of action in equity. *Atlas Underwear Co. v. Copper Underwear Co.* 210 Fed. 355; *Washington State Sugar Co. v. Sheppard*, 186 Fed. 234. This rule, however, is open to exceptions and relaxation and modification, which sometimes become necessary to preserve the ends of justice. *Smith v. Lee*, 77 Fed. 782; *Perkins v. Hendryx*, 127 Fed. 449; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 159, 160; *Cleveland Tel. Co. v. Stone*, 105 Fed. 794; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 87; *McArthur v. Scott*, 113 U. S. 392, 28 L. ed. 1031, 5 Sup. Ct. Rep. 652; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160; *Kuchler v. Greene*, 163 Fed. 98. The necessity for relaxation and modification of the rule is more frequently apparent in Federal courts of equity, where the enforcement of the rule would often oust the jurisdiction of these courts. *Elmendorf v. Taylor*, 10 Wheat. 168, 6 L. ed. 294; *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600. In applying the rule to the Federal courts, it may be stated that if all the parties interested in the suit are within the jurisdiction of the court, then the rule applies, and all the parties materially interested in the subject-matter, or object of the suit, should be brought before the court as plaintiffs or defendants, so that the matter may be settled by one decree. *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; *Consolidated Water Co. v. San Diego*, 35 C. C. A. 631, 93 Fed. 851, 852; *Bland v. Fleeman*, 29 Fed. 673; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 450, 21 L. ed. 368; *Golden v. Bruning*, *supra*; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554.

This condition as to parties has been specially provided for by new rule 39, which is only declaratory of the former practice. *Thomas v. Anderson*, 138 C. C. A. 405, 223 Fed. 41.

In stating this general rule it must not be understood that all the parties must have an interest in all the matters involved in the suit, but each party must have an interest in some of the material matters connected with the others. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 412, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; *Golden v. Bruning*, *supra*; *Finegan v. Read*, 8 Tex. Civ. App. 36, 27 S. W. 261, and cases cited; S. Eq.—15.

Jones v. Missouri-Edison Electric Co. 75 C. C. A. 631, 144 Fed. 780; Curran v. Campion, 29 C. C. A. 26, 56 U. S. App. 383, 85 Fed. 67-70.

If the cause of suit is entire in itself, and the relief sought does not consist in separate, unconnected things, all the defendants connected therewith and to be affected thereby should be made parties. It is not necessary that the interest of each defendant should extend to the whole subject-matter in litigation. Pacific Live-Stock Co. v. Hanley, 98 Fed. 329; Bailey v. Tillinghast, 40 C. C. A. 93, 99 Fed. 801; Dastervignes v. United States, 58 C. C. A. 346, 122 Fed. 36; Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 6, 7; Wyman v. Bowman, 62 C. C. A. 189, 127 Fed. 264.

It is not essential that there should be a community of interest between parties defendant, but when a common question of law arising under similar facts is involved between plaintiff and each defendant, equity has jurisdiction. Nor is it necessary that there should be a common interest in the claims and rights of action against the defendant, when they all arise from some common cause, and are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one suit brought by those uniting as plaintiffs. Osborne v. Wisconsin C. R. Co. 43 Fed. 824; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160; Sang Lung v. Jackson, 85 Fed. 502; Pillsbury Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 629; Scott v. Donald, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct. Rep. 262. There will be an illustration of these rules affecting parties, hereafter, when I discuss "the rule of parties when numerous."

Thus far I have stated only the general rule of parties in equity. We have seen that the Federal courts were incapacitated to proceed against a person not a citizen of and residing in the State and district in which the suit is brought, nor could they proceed in the absence of a Federal question, unless all the parties on one side were citizens of a different State from all the parties on the other side. We have further seen, except in a certain class of cases, the Federal courts were unable to bring in a defendant living beyond the territorial jurisdiction of the court. These conditions, of course, must have seriously affected the general rule of equity as to parties, and confined these courts

within very narrow limits, and even within these limits the question of parties became burdensome to litigants.

The Federal courts early sought to escape this incapacity imposed upon them, and began to apply the rule that where the real merits of the cause could be determined without essentially affecting the interests of absent persons, though they may be interested, they would dispense with their presence and proceed. *Russell v. Clark*, 7 Cranch, 98, 3 L. ed. 281; *Cameron v. M'Roberts*, 3 Wheat. 594, 4 L. ed. 467; *Vattier v. Hinde*, 7 Pet. 262, 8 L. ed. 679; *Payne v. Hook*, 7 Wall. 425, 17 L. ed. 260; *Hagan v. Walker*, 14 How. 36, 14 L. ed. 315.

In 1839 Congress embodied these decisions in a statute (sec. 737, United States Revised Statutes), which substantially provided that when there were several defendants in any suit at law or equity, and one or more of them were not inhabitants of, or found in the district of suit, and do not voluntarily appear, the court could entertain jurisdiction, and proceed with the parties who were properly before it, but the decree was not to affect the absent defendants, and, further, that the nonjoinder of parties who could not be reached by process should not be pleaded in abatement. New rule 39. *Mackay v. Gabel*, 117 Fed. 878; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554; *Gross v. George W. Scott Mfg. Co.* 48 Fed. 39, 40; *Barney v. Baltimore*, 6 Wall. 287, 18 L. ed. 827; *Clearwater v. Meredith*, 21 How. 489, 16 L. ed. 201.

This act related only to persons without the territorial jurisdiction of the court, and did not affect cases in which persons having an interest were in reach of the court's process, and whose joinder would not have defeated jurisdiction because of citizenship. *Ibid.*; *Barney v. Baltimore*, 6 Wall. 284, 18 L. ed. 826; *Conolly v. Wells*, 33 Fed. 204-214; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Williams v. Bankhead*, 19 Wall. 571, 22 L. ed. 184; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 126.

In 1842 the Supreme Court promulgated equity rule 47, now new rule 39, embodying this act of Congress, and provided for cases where a joinder of parties would oust jurisdiction because of citizenship, and it was in substance as follows: In all cases where it shall appear to the court that persons who might other-

wise be deemed necessary or proper parties to the suit cannot be made parties, by reason of their being out of the jurisdiction of the court, or otherwise incapable of being made parties, or because their joinder would oust the jurisdiction of the court, the court may at its discretion proceed with the case without making such persons parties; and it was provided that the decree should be without prejudice to the absent defendants. Appendix; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; *Mackay v. Gabel* and *Hagan v. Walker*, *supra*; *Hyams v. Old Dominion Co.* 204 Fed. 684; *St. Louis Independent Packing Co. v. Houston*, 215 Fed. 557, 558.

About the same time equity rule 22, now new rule 25, was promulgated by the Supreme Court, providing that if any persons other than those named in the bill as defendants shall appear to be necessary or proper parties, the bill must aver the reason why they are not made parties, by showing that they are out of the jurisdiction, or could not be made parties without ousting jurisdiction as to those before the court.

Again, in the same year, equity rule 48, now new rule 38, was promulgated as follows: That where parties plaintiff and defendant were numerous, and could not, without manifest inconvenience and oppressive delays, be all brought in before the court, then the court may in its discretion dispense with making all parties, and may proceed with the suit, if there are sufficient parties to represent all adverse interests, but the decree was to be without prejudice to absent parties. This, however, was only an affirmance of an old equity rule. *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions* Nos. 1 & 3, 90 Fed. 606; *Little v. Tanner*, 208 Fed. 608; see *Seminole Securities Co. v. Southern L. Ins. Co.* 182 Fed. 85, 96, defining a "class suit." See *Raich v. Truax*, 219 Fed. 283, 719, and cases cited; *Re Engelhart & Sons Co.* 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258.

The above act of Congress, and rules of court having the force and effect of an act of Congress (*Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Burton v. Smith*, 13 Pet. 472, 10 L. ed. 252), created well-defined exceptions to the general rule of parties, and I will here succinctly state the effect of these exceptions.

First. That persons not inhabitants of or found in the

district in which suit is brought need not, though they be proper and necessary parties, be made parties unless they voluntarily appear.

Second. That where making parties, though they be necessary and proper, would oust the jurisdiction of the court by destroying diversity of citizenship upon which jurisdiction rests, you may omit them. *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. supra.*

Third. When parties are numerous, so that bringing them all in would create delay, inconvenience, and extraordinary expense, you may bring in only so many as will fairly represent the adverse interest to be litigated. *Mandeville v. Riggs*, 2 Pet. 487, 7 L. ed. 494; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3, supra.* But see 90 Fed. 606, where parties may be numerous and representatives not found.

It will be further seen that neither the statutes nor rule 39 authorizes the court to take jurisdiction in the absence of an indispensable party. *California v. Southern P. Co.* 157 U. S. 250, 251, 39 L. ed. 691, 15 Sup. Ct. Rep. 591; *Waterman v. Canal-Louisiana Bank & T. Co.* 215 U. S. 33, 54 L. ed. 80, 30 Sup. Ct. Rep. 10.

Joint and Several Demands.

New rule 42 governing parties in joint and several demands adopts verbatim old rule 51.

To Execute Trusts of Will; Parties.

New rule 41 provides that it is not necessary to make the heir a party, in suits to execute the trusts in a will.

Suits by Trustees.

New rule 37 is substantially the same as old rule 49, providing when it is not necessary to make beneficiaries parties. See chap. 43.

Suits by and Against Incompetents.

See new rule 70. See chap. 42, Representative parties, p. 246.

CHAPTER XL.

THREE CLASSES OF PARTIES.

You will notice in the exceptions as stated, that both the classes of parties known to equity as "proper" and "necessary" may be omitted in the Federal courts. This brings us to the discussion of a third class of parties, which Federal courts of equity have been compelled to recognize, to wit, "indispensable parties." *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *California v. Southern P. Co.* 157 U. S. 249, 250, 39 L. ed. 690, 691, 15 Sup. Ct. Rep. 591; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 418; *Caylor v. Cooper*, 165 Fed. 758; *Mathieson v. Craven*, 164 Fed. 471; *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122; *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 821; *Mason v. Dullaghan*, 27 C. C. A. 296, 53 U. S. App. 539, 82 Fed. 689; *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 657; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160.

In *Barney v. Baltimore*, *supra*, you will find clear definitions of the three classes of parties recognized by Federal courts of equity.

First. There is a class with such relation to the subject-matter that while they may be parties the court may dispense with them if so made, and the plaintiff may or may not make them parties, without making his bill objectionable in either event. These are proper or formal parties. *Lake Street Elev. R. Co. v. Ziegler*, *supra*; *Donovan v. Champion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 73, 19 Mor. Min. Rep. 247; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 563, 85 Fed. 56; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 126; *Brown v. Murray, N. & Co.* 43 Fed. 617; *Hyde v. Victoria Land Co.* 125 Fed. 973; *Wallin v. Reagan*, 171 Fed. 764; *White Swan Mines Co. v. Balliet*, 134 Fed. 1004; *Wood*

v. Davis, 18 How. 469, 15 L. ed. 461; Higgins v. Baltimore & O. R. Co. 99 Fed. 641. Thus, when the party is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, he is a proper party. Ibid.; Hicklin v. Marco, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554; Wilson v. Oswego Twp. 151 U. S. 64, 38 L. ed. 74, 14 Sup. Ct. Rep. 259. See new rule 40, adopting the language of old rule 54.

Second. There is another class of parties who, if their interest in the subject-matter is called to the attention of the court, it would require them to be brought in, if within the jurisdiction, *and if bringing them in* would not *oust* the jurisdiction of the court, but who are not so indispensable to the relief asked as would prevent the court from entering a decree in their absence. This class are called "necessary parties." Chadbourne v. Coe, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 481; Williams v. Bankhead, 19 Wall. 571, 22 L. ed. 184; Donovan v. Champion, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 19 Mor. Min. Rep. 247; Kelley v. Boettcher, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 56, 64; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. *supra*; Union Mill & Min. Co. v. Dangberg, 81 Fed. 73, 90; Morrison v. Burnette, 83 C. C. A. 391, 154 Fed. 617; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 828; Hunter v. Robbins, 117 Fed. 921. Thus, where a party is interested in the controversy, or entitled to litigate the same question, but a decree can be made between the litigants properly before the court determining their interests without affecting his, then he is a necessary party, and may be omitted if his presence would be obnoxious to jurisdiction. Ibid.; Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 658; North Carolina Min. Co. v. Westfeldt, 151 Fed. 296; McConnell v. Dennis, 82 C. C. A. 501, 153 Fed. 549, 550; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610; Adams v. Woburn, 174 Fed. 194; Union Mill & Min. Co. v. Dangberg, 81 Fed. 90; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Insurance Co. of N. A. v. Svendsen, 74 Fed. 346. See new rule 39.

Under this class are placed all parties having a "separable interest," as before explained. This fact is the test in deter-

mining whether a party with an interest in the subject-matter may be omitted, so as to retain jurisdiction in the Federal court. *Ibid.*; *Omaha Hotel Co. v. Wade*, 97 U. S. 20, 24 L. ed. 918.

It is proper here to call your attention to the fact that this rule may sometimes be controlled by the complainant, as in cases where contracts are joint and several and the complainant elects to sue jointly, whereby diversity of citizenship is destroyed, when he could have sued separately and retained the diversity of citizenship. *Hooe v. Jamieson*, 166 U. S. 398, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; *Raphael v. Trask*, 118 Fed. 779.

Necessary parties may not only be dismissed to retain jurisdiction, but such parties defendant may be dismissed at any time before judgment, if a question of jurisdiction is raised. Equity rule 47; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; *Insurance Co. of N. A. v. Svendsen*, *supra*; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Claiborne v. Waddell*, 50 Fed. 369; *North Carolina Min. Co. v. Westfeldt*, 151 Fed. 296; *Slater Trust Co. v. Randolph-Macon Coal Co.* 166 Fed. 178; *Davis v. Davis*, 89 Fed. 538; *Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 660; *Donovan v. Champion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 73, 19 Mor. Min. Rep. 247. And this right to dismiss or dispense with parties is tested by the subject-matter. *Scott v. Donald*, 165 U. S. 116, 41 L. ed. 654, 17 Sup. Ct. Rep. 262; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 417, 418; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 629.

Third. There is a class of parties whose interests are so bound up in the subject-matter of litigation and the relief sought, that the court cannot proceed without them, or proceed to a final decree without affecting their interests; that is, their rights must be unavoidably passed upon in reaching a final decree. These are called "indispensable parties," and must be made parties, even though the effect would be to oust the jurisdiction of the court. *Sioux City Terminal R. & Warehouse*

Co. v. Trust Co. of N. A. supra; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 607, 610; Shields v. Barrow, supra; Wallin v. Reagan, 171 Fed. 763, 764; New Chester Water Co. v. Holly Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 27; Williams v. Bankhead, 19 Wall. 571, 22 L. ed. 187; Chadbourne v. Coe, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 480; Morrison v. Burnette, supra; O'Neil v. Walcott Min. Co. 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 536 and case cited; Lawrence v. Southern P. Co. 165 Fed. 241; Mathieson v. Craven, 164 Fed. 471; Caylor v. Cooper, 165 Fed. 758; Lawrence v. Times Printing Co. 90 Fed. 28.

If then the issue arises, that parties who are indispensable have not been made, or it should appear during the trial, the court must either dismiss the case or hold it until they are made parties; and if to make them parties would destroy the diversity of citizenship, and thereby oust the jurisdiction of the court, then the court cannot entertain jurisdiction of that case, and should dismiss at once (Shields v. Barrow, 17 How. 142, 15 L. ed. 161; Christian v. Atlantic & N. C. R. Co. 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260; Barney v. Baltimore, 6 Wall. 280-291, 18 L. ed. 825-828; Swan Land & Cattle Co. v. Frank, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 254; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. supra; Greer, M. & Co. v. Stoller, 77 Fed. 5; Raphael v. Trask, 118 Fed. 678; Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 246, 14 L. ed. 680); for the court cannot proceed if absent defendants are indispensable. Authorities above; Bland v. Fleeman, 29 Fed. 669; Gregory v. Stetson, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; Gray v. Havemeyer, 3 C. C. A. 497, 10 U. S. App. 456, 53 Fed. 178; Oberlin College v. Blair, 70 Fed. 419; Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20 L. ed. 82; Hagan v. Walker, 14 How. 29, 14 L. ed. 312. Section 737, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 587, and equity rule 39 does not affect this rule of parties. Shields v. Barrow, 17 How. 139, 15 L. ed. 160; Duchesse d'Auxy v. Porter, 41 Fed. 69; Barney v. Baltimore, 6 Wall. 285, 18 L. ed. 826; Coiron v. Millaudon, 19 How. 115, 15 L. ed. 575; Conolly v. Wells, 33 Fed. 205; Gregory v.

Swift, 39 Fed. 708 and cases cited; Collins Mfg. Co. v. Ferguson, 54 Fed. 721; Gregory v. Stetson, 133 U. S. 587, 33 L. ed. 794, 10 Sup. Ct. Rep. 422. If then you have all the indispensable parties before the court, you may proceed without reference to proper or necessary parties. Tug River Coal & Salt Co. v. Brigel, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818; Smith v. Lee, 77 Fed. 782.

It may be stated, then, that in testing the class to which the party belongs, the inquiry should be: Can the interest of the present and absent be separated? If not, the absent are indispensable parties, and the court cannot proceed without them. Ibid.; Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 450, 21 L. ed. 368; Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 545; Fourth Nat. Bank v. New Orleans & C. R. Co. supra. Or it may be asked if the interest of the absent parties will be affected by the decree; if so, they are indispensable. Shields v. Barrow, 17 How. 139, 15 L. ed. 160; Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 246, 14 L. ed. 680.

To illustrate: If no relief can be given without accounting with an absent defendant, then you cannot proceed without him. Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 630, 20 L. ed. 83; Bell v. Donohoe, 8 Sawy. 435, 17 Fed. 711; Raphael v. Trask, 118 Fed. 779; Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69; Duchesse d'Auxy v. Porter, 41 Fed. 68; Perrin v. Lepper, 26 Fed. 545. So in partition among joint owners (Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726), and also in case of cancelation of mortgage for fraud, mortgagor is an indispensable party. So stockholders, or parties in possession of real or personal property, are indispensable when the right to property is litigated. Ibid.; Massachusetts & S. Constr. Co. v. Cane Creek Twp. 155 U. S. 285, 39 L. ed. 153, 15 Sup. Ct. Rep. 91; Wilson v. Oswego Twp. 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259; Scoutt v. Keck, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 904; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 569. So a trustee in a mortgage in a suit by bondholders. Ibid.; Missouri use of Public School Fund v. New Madrid County, 73 Fed. 306, 307; Thayer v. Life Association of America, 112 U. S. 717, 28 L.

ed. 864, 5 Sup. Ct. Rep. 355. See *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122; *Smith v. Lee*, 77 Fed. 779. (See "Trustees as Parties.")

The pledgee of a chose in action having an equitable interest should be made a party, and the pledgor is an indispensable party where the pledge is involved. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 57; *Smith v. Lee*, 77 Fed. 783.

So, a bailee, where the possession sued for is held to await the performance of a condition (*Wilson v. Oswego Twp.* 151 U. S. 65, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; see *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122); but not a mere depository or stake holder (*Scoutt v. Keck*, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 904; *Reeves v. Corning*, 51 Fed. 778; *Central Trust Co. v. Benedict*, 24 C. C. A. 56, 49 U. S. App. 35, 78 Fed. 202; *First Nat. Bank v. Merchants' Bank*, 2 L.R.A. 469, 37 Fed. 658; but see *Perrin v. Lepper*, 26 Fed. 545); or agent having no personal interest (*Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 577).

In a suit to cancel a note, by the maker against the holder, an endorsee for collection is not a necessary party. *New York Constr. Co. v. Simon*, 53 Fed. 4; *Wood v. Davis*, 18 How. 469, 15 L. ed. 461.

So, in foreclosure of a mortgage, the mortgagor and mortgagee are indispensable (*Davis v. Mercantile Trust Co.* 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; *Coiron v. Milaudon and Tug River Coal & Salt Co. v. Brigel*, supra); and subsequent judgment and lien creditors are indispensable, if relief goes beyond simple foreclosure, and their interests would be affected by the decree (*Ibid.*; *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 23 Fed. 514; *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 845, 849, 25 L. ed. 1083-1085). So a corporation is indispensable in transfer of stock on the books (*Kendig v. Dean*, 97 U. S. 425, 24 L. ed. 1062; *Crump v. Thurber*, 115 U. S. 56, 29 L. ed. 328, 5 Sup. Ct. Rep. 1154; but see *Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 661); or when corporate rights are affected (*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691); or when creditor sues a part of the stockholders of a corporation (*Hale v. Coffin*, 114 Fed. 573; *Swan*

Land & Cattle Co. v. Frank, 148 U. S. 610, 611, 27 L. ed. 580, 13 Sup. Ct. Rep. 691. So are all partners in an action to vacate partnership transaction. Bell v. Donohue, 8 Sawy. 435, 17 Fed. 711. So all heirs in suit for fraudulent conversion by an administrator. Bland v. Fleeman, 29 Fed. 672. So adverse claimants in suits for conversion of notes. Gregory v. Swift, 39 Fed. 712.

The bill must set forth indispensable parties under all conditions, and it must set forth "necessary" parties, if within the jurisdiction, or it is objectionable, which may be reached by demurrer, plea, or answer. If, however, the parties set forth are not indispensable, that is, if their interest in the cause of action, is separable, and they are not within reach of the court's process, the court may proceed without them. Or if they be not indispensable, and within reach of the court's process, the court should bring them in, unless it would oust jurisdiction. Equity rule 22; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; Ins. Co. of N. A. v. Svendsen, 74 Fed. 346.

I will here call your attention to the fact that after jurisdiction has attached with proper parties before the court, then parties who if originally made parties would be dismissed to protect jurisdiction may on their own petition come into the case without affecting the jurisdiction of the court. Tug River Coal & Salt Co. v. Brigel, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 629; Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; equity rule 39; U. S. Rev. Stat. secs. 737, 738; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. supra, and cases cited; Society of Shakers v. Watson, 15 C. C. A. 632, 37 U. S. App. 185, 68 Fed. 736. This exception is based on the fact that such petition would only be ancillary to the main suit, in which diversity of citizenship is not necessary to give jurisdiction, as will be seen hereafter.

Unknown Parties.

When the bill sets forth that the parties are unknown, the cause must proceed in the absence of a denial by answer. Alger v. Anderson, 78 Fed. 729. See Tug River Coal & Salt Co. v.

Brigel, *supra*, where the allegation that parties are unknown defeated jurisdiction.

From the discussion of parties so far to a bill, the following rules may be deduced and considered in framing a bill:

First. You *may* join all proper parties if you desire to do so.

Second. You *must* join all necessary parties if in the jurisdiction of the court, unless fatal to jurisdiction.

Third. You *must* join all indispensable parties unless too numerous to be brought before the court as provided for in new rule 38. *Continental & Commercial Trust & Sav. Bank v. Corey Bros. Constr. Co.* 126 C. C. A. 64, 208 Fed. 982; *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184.

It is proper to here call your attention again to section 8 of act of 1875, providing that in a certain class of cases, to wit, where suit is commenced to enforce a lien or claim, legal or equitable, or to remove any cloud or encumbrance on the title to real estate or personal property within the district where the suit was brought, the defendant or defendants not being inhabitants of or found within the district of said suit could be brought in by a "warning order," or by publication, the decree, however, only to affect the property, no personal judgment being allowed. In this character of cases you may now bring in a "necessary" or indispensable party who is beyond the territorial limits of the court's jurisdiction. *Massachusetts Mut. L. Ins. Co. v. Chicago & A. R. Co.* 13 Fed. 857. New Code, sec. 57, chap. 4, Comp. Stat. 1913, sec. 1039; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 932-943, and cases cited.

The "necessary parties," being brought within the reach of process, though beyond the territorial jurisdiction of the court, by this act, should be made parties, as I think the act takes the character of cases mentioned therein out of the rule that "necessary" parties beyond the territorial jurisdiction of the court may be dispensed with.

CHAPTER XLI.

WHEN PARTIES ARE NUMEROUS.

Under the third exception to the general rule of parties, as stated in equity rule 38, referring to the condition where parties are numerous, it is submitted: That when parties are numerous, or if the question be one of general interest, and only a few may sue for the many, or when the parties from a voluntary association fairly represent the interests of all, the court will permit the few to sue for the many. *Watson v. National Life & Trust Co.* 88 C. C. A. 380, 162 Fed. 7-12; *United States v. Old Settlers*, 148 U. S. 480, 37 L. ed. 529, 13 Sup. Ct. Rep. 650; *Barnes v. Berry*, 156 Fed. 73; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union* Nos. 1 & 3, 90 Fed. 606; *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Smith v. Swormstedt*, 16 How. 302, 14 L. ed. 948. See *Motley v. Southern R. Co.* 184 Fed. 958, for an allegation held not sufficient to show a class suit. *Ex Parte Equitable Trust Co.* 231 Fed. 592, — C. C. A. —; *Merchants' & Mfrs.' Traffic Asso. v. United States*, 231 Fed. 295; *Kardo Co. v. Adams*, — C. C. A. —, 231 Fed. 950.

The interest, however, must be in the subject-matter. *Scott v. Donald*, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *United States v. Coal Dealers' Asso.* 85 Fed. 252.

This rule is a very convenient one, because where parties are numerous their rights and liabilities are subject to change and fluctuations, by death and assignment, which would greatly impede the orderly progress of a suit under equity rules, which are provided only for reaching an issue, and preparing an equity case for hearing on its merits. For these reasons courts of equity have sought to eliminate the probability of these inconveniences. *Mandeville v. Riggs*, 2 Pet. 482, 7 L. ed. 493.

Mr. Justice Story laid down many years ago the rules governing parties when numerous, as follows:

First. When the object of the bill and the questions arising are of common or general interest to all.

Second. In cases where parties have formed a voluntary association for public or private purpose, and those who sue fairly represent the interest of all.

Third. Where parties are very numerous, and, though there may have been separate and distinct interests, yet it is impossible to bring them before the court without manifestly impeding the cause and ends of justice; but in those cases, where the rights and interests are distinct and separate, the rule would not apply unless the bill discloses a common interest or right sought to be established, enforced, or protected. *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801. Though the interests be separate, the suit must be for an object common to all, or against numerous parties representing a common interest. New rule 38, same as old rule 48. *Little v. Tanner*, 208 Fed. 605.

The few selected as parties must fairly represent the interests of all, so that a full and honest trial may be had. *Smith v. Swormstedt*, *supra*. Thus, a creditor may sue for the benefit of all having like interests. Lastly, in considering the rule of parties, much depends on the prayer of the bill. The question is, Who are to be directly affected by the prayer, or have to act under it?

Equity rule 54, now new rule 40, provides that when no account, payment, conveyance, or other direct relief is sought against a party to a suit not being an infant, the party need not appear unless required to do so by the prayer of the bill. The plain meaning of the rule is that no one should be made plaintiff who has no interest in the relief sought, and no one defendant from whom nothing is demanded. A person may be interested in the subject-matter, but if his rights are not put in issue so that some relief must be asked in your prayer, it is not necessary to make him a party. *Payne v. Hook*, 7 Wall. 432, 19 L. ed. 262; *Smith v. Lee*, 77 Fed. 780; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 89, 90.

CHAPTER XLII.

PARTIES IN PARTICULAR CASES.

Married Women as Parties.

In suits by married women, the husband must join in all cases, unless their interests are antagonistic, or he refuses to join, then he must be made defendant; and in such cases the wife must sue by next friend. Equity rule 70; *Douglas v. Butler*, 6 Fed. 228; *Taylor v. Holmes*, 14 Fed. 498; *United States v. Pratt Coal & Coke Co.* 18 Fed. 708. Thus rule must be observed, as Federal courts will not follow State practice or State statutes creating a different rule in equity suits. *Wills v. Pauly*, 51 Fed. 257; *United States v. Pratt Coal & Coke Co.* supra. But they do follow State practice on the law side. *Texas & P. R. Co. v. Humble*, 38 C. C. A. 502, 97 Fed. 837; *Morning Journal Asso. v. Smith*, 4 C. C. A. 8, 1 U. S. App. 270, 56 Fed. 141; *Mehrhoff v. Mehrhoff*, 26 Fed. 13.

Joint and Several Parties.

Equity rule 51, now new rule 42, provides that in all cases in which the plaintiff has a joint and several demand against several persons, either as principal or surety, it shall not be necessary to bring before the court all persons liable thereto, but the plaintiff may proceed against one or more of the parties severally liable, but plaintiffs must join as a general rule.

Stockholders as Parties.

Equity rule 27 provides that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be *properly asserted* by the *corporation*, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, and that the suit is not a collusive one to confer on a court of the United States

jurisdiction of a case of which it otherwise would not have cognizance. It must also set forth with particularity the effort to secure by plaintiff such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action. (Jan., 1882.) The rule was promulgated to give effect to the decision in *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827. It is self-explanatory and states under what conditions stockholders may become parties plaintiff in a bill in equity, and the conditions are imperative. *Venner v. Great Northern R. Co.* 153 Fed. 411 and cases cited; *Delaware & H. Co. v. Albany & S. R. Co.* 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540; *Poor v. Iowa C. R. Co.* 155 Fed. 226; *Mills v. Chicago*, 127 Fed. 732; *Waller v. Coler*, 125 Fed. 821; *Gage v. Riverside Trust Co.* 156 Fed. 1006; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; *Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 628; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 459-463, 47 L. ed. 258, 259, 23 Sup. Ct. Rep. 157; *Price v. Union Land Co.* 110 C. C. A. 20, 187 Fed. 886; *Hirsch v. Independent Steel Co.* 196 Fed. 104; *Hunnewell v. New York C. & H. R. R. Co.* 196 Fed. 543; *Kelly v. Dolan*, 218 Fed. 966.

Failure to comply with rule does not raise a question of jurisdiction, but of authority of plaintiff to maintain the bill. *Illinois C. R. Co. v. Adams*, 180 U. S. 35, 45 L. ed. 412, 21 Sup. Ct. Rep. 251. See *Wathen v. Jackson Oil & Ref. Co.* 235 U. S. 635, 59 L. ed. 395, 35 Sup. Ct. Rep. 225; *Dana v. Morgan*, 219 Fed. 313.

In *Bill v. Western U. Teleg. Co.* 16 Fed. 14, it was declared that the individual stockholder could only maintain suit against the corporation, when it was made to appear that he had exhausted all means to obtain redress in the corporation itself, and that he has made proper effort to get other stockholders to take action. *Ibid.*; *Macon, D. & S. R. Co. v. Shailer*, 72 C. C. A. 631, 141 Fed. 585; *Edwards v. Mercantile Trust Co.* 124 Fed. 381, 382; *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 451; *Squair v. Lookout Mountain Co.* 42 Fed. 732; *Quincy v. Steel*, 120 U. S. 248, 30 L. ed. 626, 7 Sup. Ct. Rep. 520; *Detroit v. Dean*, 106 U. S. 537-542, 27 L. ed. 300-302, 1 Sup. Ct. Rep. 500; *Porter v. Sabin*, 149 U. S. 478, 37 L. ed. 818, 13 Sup. Ct. Rep. 1008; *Savings & T.*

Co. v. Bear Valley Irrig. Co. 112 Fed. 704; Metcalf v. American School Furniture Co. 108 Fed. 911; Elkins v. Chicago, 119 Fed. 957; Bimber v. Calivada Colonization Co. 110 Fed. 58. See Kessler & Co. v. Ensley Co. 129 Fed. 397; Smith v. Chase & B. Piano Mfg. Co. 197 Fed. 466, 467; Strong v. Edson, 117 C. C. A. 455, 198 Fed. 813; Post v. Buck Stove & Range Co. 43 L.R.A.(N.S.) 498, 117 C. C. A. 214, 200 Fed. 918; Kelly v. Mississippi River Coaling Co. 175 Fed. 483; Hutchings v. Cobalt Central Mines Co. 189 Fed. 241; Howard v. National Teleph. Co. 182 Fed. 221; Binney v. Cumberland Ely Copper Co. 183 Fed. 651; Dana v. Morgan, 219 Fed. 313, where majority approved the refusal of the company to act, and it was held that the minority stock could not sue; nor when directors act under the advice of an attorney. Hendrickson v. Bradley, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508.

An individual stockholder bringing suit must show that the rights of the corporation are involved, and the corporation should be made a party to the suit, or the bill is demurrable. Porter v. Sabin, *supra*; Eldred v. American Palace Car Co. 44 C. C. A. 554, 105 Fed. 458; Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; Groel v. United Electric Co. 132 Fed. 252; McMullen v. Ritchie, 64 Fed. 262; Ross v. Quinnesec Iron Min. Co. 227 Fed. 337.

In Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450-462, 26 L. ed. 827-832, it is held that a stockholder must show: First. Some action done or threatened, by the directors or trustees which is beyond the authority conferred by the charter or the law; *or* a fraudulent transaction done or threatened among themselves, or with some other parties or the shareholders, which will result in injury to the company, *or* the other shareholders; or that a majority of the shareholders are illegally pursuing in the name of the company a course which is violating the rights of other shareholders, which can only be redressed in a court of equity, and under any of these grounds it must further be alleged that the complainant made an earnest effort to obtain redress from the directors and shareholders of the company; that he owned the stock when the transactions of which he complained occurred, or it was thereafter transferred to him by operation of law. *Ibid.*; Cowell v. McMillin, 100 C. C. A. 443, 177 Fed. 25; Caffall v. Bandera Teleph. Co. — Tex. Civ. App. —, 136

S. W. 105; *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 663; *Clarke v. Eastern Bldg. & L. Asso.* 89 Fed. 781; *Consolidated Water Co. v. San Diego*, 89 Fed. 272; *Hutton v. Joseph Bancroft & Sons Co.* 83 Fed. 17. As to allegation of ownership, see *Robinson v. West Virginia Loan Co.* 90 Fed. 772, and cases cited.

These conditions setting up the right of a stockholder to sue are not jurisdictional, but go simply to plaintiff's right to maintain the bill (*Illinois C. R. Co. v. Adams*, 180 U. S. 34-35, 45 L. ed. 413, 21 Sup. Ct. Rep. 251), and should be complied with under equity rule 27. *Ziegler v. Lake Street Elev. R. Co.* supra; *Eldred v. American Palace Car Co.* 99 Fed. 168; *Church v. Citizens' Street R. Co.* 78 Fed. 526; *Ryan v. Williams*, 100 Fed. 172; *Russell v. Shippen Bros. Lumber Co.* 224 Fed. 254.

There must be no collusion. Equity rule 27. *Kemmerer v. Haggerty*, 139 Fed. 693; *Groel v. United Electric Co.* 132 Fed. 252; *Detroit v. Dean*, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; *Farmington v. Pillsbury*, 114 U. S. 146, 29 L. ed. 117, 5 Sup. Ct. Rep. 807. See *Mills v. Chicago*, 127 Fed. 732; *Consumers Gas Co. v. Quinby*, 70 C. C. A. 220, 137 Fed. 882; *New Albany Waterworks v. Louisville Bkg. Co.* 58 C. C. A. 576, 122 Fed. 776. The suit must show amount of stock held by the stockholder, though suing in behalf of others. *Harvey v. Raleigh & G. R. Co.* 89 Fed. 115. As to the relation of the stockholders to the corporation, and when minority may sue, see *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 765; *Foster v. Bank of Abingdon*, 88 Fed. 606, 607; *Wheeler v. Abilene Nat. Bank Bldg. Co.* 16 L.R.A.(N.S.) 892, 89 C. C. A. 482, 159 Fed. 391, 14 Ann. Cas. 917; *Jones v. Missouri-Edison Electric Co.* 117 C. C. A. 442, 199 Fed. 64, reversing 75 C. C. A. 631, 144 Fed. 765; *Jackson v. Gardiner Invest. Co.* 118 C. C. A. 287, 200 Fed. 113; *Backus v. Brooks*, 115 C. C. A. 364, 195 Fed. 452; *Citizens' Sav. & T. Co. v. Illinois Central R. Co.* 105 C. C. A. 145, 182 Fed. 608; *Lawrence v. Southern P. Co.* 180 Fed. 822; *Marks v. Merrill Paper Co.* 123 C. C. A. 380, 203 Fed. 16.

The rules above given do not apply when a suit is brought by depositors against directors who have wrecked the bank. *Foster v. Bank of Abingdon*, 88 Fed. 604-607. Nor when the directors are charged with wrecking the bank (*Ibid.*; *Excelsior*

Pebble Phosphate Co. v. Brown, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 323; De Neufville v. New York & N. R. Co. 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10; Rogers v. Nashville, C. & St. L. R. Co. 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299); or with being guilty of fraudulent acts causing irreparable injury to corporate interests (Foster v. Mansfield, C. & L. M. R. Co. 36 Fed. 628; McKee v. Chautauqua Assembly, 124 Fed. 811). Nor when the demand would be useless. Zeigler v. Lake Street Elev. R. Co. 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662; Weir v. Bay State Gas Co. 91 Fed. 940; Universal Sav. & T. Co. v. Stoneburner, 51 C. C. A. 208, 113 Fed. 255; Watson v. United States Sugar Refinery, 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769-772; Lamm v. Parrot Silver & Copper Co. 111 Fed. 241; Mumford v. Ecuador Development Co. 111 Fed. 639; Berwind v. Canadian P. R. Co. 98 Fed. 158; Hyams v. Calumet & H. Min. Co. 137 C. C. A. 239, 221 Fed. 529. Nor when the bill seeks a dissolution of the corporation and a distribution of its assets. Taylor v. Decatur Mineral & Land Co. 112 Fed. 449. Nor when the jurisdiction depends on a Federal question. Lindsley v. Natural Carbonic Gas Co. 162 Fed. 957; Kimball v. Cedar Rapids, 99 Fed. 130; Dickinson v. Consolidated Traction Co. 114 Fed. 241. Nor when the cause of action antedates the right as stockholder. Rogers v. Penobscot Min. Co. 154 Fed. 606. New rule 27 does not apply to a bill by a stockholder to appoint an ancillary receiver. Bluefields S. S. Co. v. Steele, 112 C. C. A. 411, 192 Fed. 23. Nor when the relief sought would be detrimental to their interests as directors or stockholders. Hyams v. Calumet & H. Mining Co. 137 C. C. A. 239, 221 Fed. 538, and cases cited; Ogden v. Gilt Edge Consol. Mines Co. — C. C. A. —, 225 Fed. 728. The provision requiring a bill to be sworn to does not apply to cases removed. Maeder v. Buffalo Bill's Wild West Co. 132 Fed. 280.

In a suit by a creditor to enforce the individual liability of stockholders, the corporation and stockholders must be made parties. Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 252, 84 Fed. 76; Continental Adjustment Co. v. Cook, 152 Fed. 652; Fernald v. Glenn, 12 C. C. A. 27, 26 U. S. App. 202, 64 Fed. 49; Sidway v. Missouri Land & Live Stock Co. 116 Fed. 382. See Hamilton v. Levison, 198 Fed. 444; Irvine v. Blackburn,

198 Fed. 360; *Thomas v. Matthiessen*, 113 C. C. A. 101, 192 Fed. 495. Of national banks, see *Williamson v. American Bank*, 109 Fed. 36. Stockholders need not be made parties to adjust the liabilities of the corporation.

A bill asking a receiver and seeking to make the stockholders liable must make the corporation a party. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 76, 87 Fed. 252. A receiver can bring an action against all stockholders, though he has a separate suit against each. *Bausman v. Denny*, 73 Fed. 70, but see *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, and *Fidelity Trust & S. D. Co. v. Archer*, 179 Fed. 32.

The corporation need not be a party to a suit against a stockholder to try title to stock. *Higgins v. Baltimore & O. R. Co.* 99 Fed. 640. And when suit is brought by the corporation to cancel stock the trustee need not be made a party. *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 114.

Partnership—Parties.

As a general rule, partnership rights and liabilities cannot be determined unless all the partners are parties to the bill (*Bill v. Donohoe*, 17 Fed. 711; *Raphael v. Trask*, 118 Fed. 779, 194 U. S. 277, 48 L. ed. 978, 24 Sup. Ct. Rep. 647), and they are indispensable parties. *Ibid.* But sometimes one member of a partnership may desire to file a bill in which the others refuse to join, in which case those who refuse to join must be made defendants. *Edgell v. Felder*, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69.

Sometimes, also, it occurs that because of the citizenship of one or more of the partners the jurisdiction of the Federal court would be ousted, and, being indispensable parties, they cannot be dismissed so as to give jurisdiction. (See "Citizenship of Partners.") *Ruble v. Hyde*, 1 McCrary, 513, 3 Fed. 331; *Ralya Market Co. v. Armour & Co.* 102 Fed. 532-533; see *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 458, 44 L. ed. 845, 20 Sup. Ct. Rep. 690; see, also, *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271. I think this is the true rule, but in *Smith v. Consumers Cotton Oil Co.* 30 C. C. A. 103, 52 U. S. App. 603, 86 Fed. 359, it was held that in an

action against a firm having a member whose presence would oust the jurisdiction of the Federal court, the court could dismiss as to him. This ruling seems to be based on section 737 of the United States Revised Statutes, authorizing dismissal of such defendants who are neither inhabitants of nor found in the district, but this section has never before been applied to nonresident defendants who are indispensable parties, as in partnerships.

Where a nonresident partner dies it is held that his representatives are not indispensable. *Perkins v. Hendryx*, 127 Fed. 448.

Representative Parties.

I will now briefly discuss parties who appear in the record, not in their own, but in the interest of others, such as trustees, executors and administrators, and guardians *ad litem*, and receivers.

Guardians ad Litem.

Equity rule 87, now new rule 70, provides that guardians *ad litem* to defend a suit may be appointed by the court, or by a judge thereof, for infants or other persons under guardianship, or otherwise incapacitated for suing for themselves; and the same character of persons may sue by guardian, if any, or next friend, subject to such orders as the court may direct for the protection of these persons. *Bank of United States v. Ritchie*, 8 Pet. 144, 8 L. ed. 897; *Woolridge v. McKenna*, 8 Fed. 660. See in *Re Moore*, 209 U. S. 496-497, 52 L. ed. 907, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164.

Executors and Administrators as Parties.

In discussing executors and administrators as parties in a Federal court, I will briefly speak of the jurisdiction of the Federal courts in probate matters. See new rule 37.

The determination of the jurisdiction in cases of this character, as said in *Jordan v. Taylor*, 98 Fed. 645, is not free from difficulty. There has been conflict of opinion as to how far the Federal courts can interfere with the properties and rights of parties in an estate in due course of administration

under the probate laws of the respective States. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*), 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; *Underground Electric R. Co. v. Owsley*, 169 Fed. 671, 99 C. C. A. 500, 176 Fed. 26; *Thiel Detective Service Co. v. McClure*, 130 Fed. 55; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Moore v. Fidelity Trust Co.* 70 C. C. A. 663, 138 Fed. 1; *Yonley v. Lavender*, 21 Wall. 279, 22 L. ed. 537; *Re Foley*, 80 Fed. 949; *Simmons v. Saul*, 138 U. S. 439-460, 34 L. ed. 1054-1063, 11 Sup. Ct. Rep. 369; *Hale v. Coffin*, 114 Fed. 575; *Bedford Quarries Co. v. Tomlinson*, 36 C. C. A. 272, 95 Fed. 210; *Lant v. Manley*, 71 Fed. 7. There is one principle connected with the subject which has been firmly established, and that is, when property is in possession of the probate court it cannot be taken or disturbed by another court. *Ibid.*; *Byers v. McAuley*, 149 U. S. 615, 37 L. ed. 871, 13 Sup. Ct. Rep. 906; *Yonley v. Lavender*, 21 Wall. 284, 22 L. ed. 539; *Jordan v. Taylor*, 98 Fed. 646; *Hale v. Coffin*, 114 Fed. 575; *McPherson v. Mississippi Valley Trust Co.* 58 C. C. A. 455, 122 Fed. 367, 368; *Hale v. Tyler*, 115 Fed. 835; *Newberry v. Wilkinson*, 118 C. C. A. 111, 199 Fed. 673, and cases cited. An administrator appointed by a State court is an officer of that court, and his possession of the assets of the estate is the possession of the court. *Byers v. McAuley*, 149 U. S. 615, 37 L. ed. 871, 13 Sup. Ct. Rep. 906; *Williams v. Benedict*, 8 How. 112, 12 L. ed. 1008; *McPherson v. Mississippi Valley Trust Co.* 58 C. C. A. 455, 122 Fed. 367, 368. The States have conclusive control over estates of deceased persons in their limits. *Ibid.*; *Yonley v. Lavender*, *supra*; *Underground Electric R. Co. v. Owsley*, 169 Fed. 671; *Kittredge v. Race*, 92 U. S. 121, 23 L. ed. 490; *Ball v. Tompkins*, 41 Fed. 490; *Lant v. Manley*, 71 Fed. 12; *Underground Electric R. Co. v. Owsley*, 99 C. C. A. 500, 176 Fed. 26. Thus, a non-resident creditor having judgment in a Federal court against a deceased person whose estate is being administered in a probate court of a State, cannot by process reach such estate (*Yonley v. Lavender*, *supra*; *Perry v. Bank of Cape Fear*, 20 Fed. 775; *Re Foley*, 76 Fed. 395, 80 Fed. 950, 951; *Ball v. Tompkins*, 41 Fed. 490; *Hale v. Tyler*, 115 Fed. 835); nor by bill to compel administrators to satisfy debt (*Bedford Quarries Co.*

v. Tomlinson, *supra*; McPherson v. Mississippi Valley Trust Co. 58 C. C. A. 455, 122 Fed. 367). Nor will a bill lie in equity to dispossess administrators of control over decedent's estate. Lant v. Manley, 71 Fed. 12; Re Foley, 80 Fed. 951, and cases cited. Nor can jurisdiction be obtained by removal. Wahl v. Frant, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 680; Re Aspinwall, 83 Fed. 852; Copeland v. Bruning, 72 Fed. 8. Nor can a Federal court probate a will (Re Foley, 80 Fed. 951; Re Cilley, 58 Fed. 984; Tarver v. Tarver, 9 Pet. 174-180, 9 L. ed. 91-93; Fouvergne v. Municipality No. 2, 18 How. 470, 15 L. ed. 399; Ball v. Tompkins, 41 Fed. 486; Hale v. Coffin, 114 Fed. 574; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, discussed in Wahl v. Franz, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 683-684. See Cilley v. Patten, 62 Fed. 498; Miller v. Weston, 199 Fed. 104), or determine question of *testamentum vel non* (Copeland v. Bruning, 72 Fed. 8; Oakley v. Taylor, 64 Fed. 245; Reed v. Reed, 31 Fed. 53); but may entertain contest after probate (Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; Sawyer v. White, 58 C. C. A. 587, 122 Fed. 223-227; Wart v. Wart, 117 Fed. 766. See Underground Electric R. Co. v. Owsley, 169 Fed. 671); or set aside the probate. Carrau v. O'Calligan, 60 C. C. A. 347, 125 Fed. 657; Farrell v. O'Brien (O'Callaghan v. O'Brien), 199 U. S. 103, 50 L. ed. 108, 25 Sup. Ct. Rep. 727; Broderick's Will (Kieley v. McGlynn), 21 Wall. 509-517, 22 L. ed. 602-604; Briggs v. Stroud, 58 Fed. 720; Simmons v. Saul, 138 U. S. 450-459, 34 L. ed. 1059-1062, 11 Sup. Ct. Rep. 369; Garrett v. Boling, 15 C. C. A. 209, 37 U. S. App. 42, 68 Fed. 56. Nor can a Federal court administer an estate of a deceased person, either by original proceeding or removal (Clark v. Guy, 114 Fed. 783; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Re Foley, 80 Fed. 950; Copeland v. Bruning, *supra*); but the rule of noninterference is not applicable to property in hands of Federal court when owner dies (Rio Grande R. Co. v. Gornila [Rio Grande R. Co. v. Vinet], 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; Hale v. Tyler, 115 Fed. 835).

We thus see that the prohibition of any interference by Federal courts in probate matters, and in matters where the local

courts have taken jurisdiction, rests upon the principle of non-interference with the *res* when State courts have assumed jurisdiction, as well as on the fact that Congress has not conferred on the circuit courts any probate powers. When, however, a suit can be brought originally against an executor or administrator in the *courts of the State*, with which the *Federal courts have concurrent jurisdiction*, then the suit may be brought in the Federal court, if the grounds of jurisdiction otherwise exist. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*), 199 U. S. 110, 50 L. ed. 111, 25 Sup. Ct. Rep. 727; *Ingersoll v. Coram*, 132 Fed. 172, 127 Fed. 418; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; *Wart v. Wart*, 117 Fed. 766; *Williams v. Crabb*, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193; *Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; *Eddy v. Eddy*, 93 C. C. A. 586, 168 Fed. 598; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *Davis v. Davis*, 89 Fed. 537; see *Underground Electric R. Co. v. Owsley*, 99 C. C. A. 500, 176 Fed. 26.

But a suit cannot be instituted in a Federal court in a State other than the State in which the estate is being administered, against an executor. *Lawrence v. Southern P. R. Co.* 177 Fed. 547. If the administration has been completed, and the property has passed out of the control of the probate courts, the Federal courts can avail themselves of their jurisdiction in law or equity, in reference thereto. *Hale v. Coffin*, 114 Fed. 575; *Herron v. Comstock*, 71 C. C. A. 466, 139 Fed. 371, 378; *Hayes v. Pratt*, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503; *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 379; or when State court has not taken possession of *res*. *Hale v. Tyler*, 115 Fed. 838, 839. Or when the suit is one of acknowledged equity jurisdiction, as, when specific enforcement of a contract is brought against the heirs and administrator of a deceased person,—a Federal court of equity will enforce it, though the contract relates to property of an estate in process of administration. *Spencer v. Watkins*, *supra*; *Davis v. Davis*, 89 Fed. 537; and authorities. *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 379.

So, an heir may establish his right to a distributive share of the estate (*Byers v. McAuley*, 149 U. S. 620, 37 L. ed. 873, 13 Sup. Ct. Rep. 906; *Payne v. Hook*, 7 Wall. 425, 19

L. ed. 260; *O'Callahan v. O'Brien*, 116 Fed. 934; *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 273), or the possession of real estate devised by will (*Harrison v. Rowan*, 4 Wash. C. C. 202, Fed. Cas. No. 6,143). So, a creditor may establish in a Federal court a debt against an estate (*Fondley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Hale v. Coffin*, 114 Fed. 568; see *Farmers' Bank v. Wright*, 158 Fed. 841; *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 272, 95 Fed. 208; *Johnson v. Waters*, 111 U. S. 668-675, 28 L. ed. 556-559, 4 Sup. Ct. Rep. 619; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; *Payne v. Hook*, 7 Wall. 431, 19 L. ed. 262); or a lien on the undivided shares (*Ingersoll v. Coram*, 127 Fed. 418; *Continental Nat. Bank v. Heilman*, 81 Fed. 42-43; see *Schurmeier v. Connecticut Mut. L. Ins. Co.* 60 C. C. A. 51, 124 Fed. 865, s. c. 69 C. C. A. 22, 137 Fed. 42); but the classification of claims by probate law binds the Federal courts (*Dodd v. Ghiselin*, 27 Fed. 407). Or a suit after final account rendered may be brought against the administrator or executor who holds in trust. *Colt v. Colt*, 111 U. S. 566, 28 L. ed. 520, 4 Sup. Ct. Rep. 553. Or a court of equity may decree a discovery and accounting against an executor. *Plume & A. Mfg. Co. v. Baldwin*, 87 Fed. 785; *Pulliam v. Pulliam*, 10 Fed. 23; *Davis v. Davis*, 89 Fed. 537; *Eddy v. Eddy*, 93 C. C. A. 586, 168 Fed. 591.

So, a bill in equity will lie, in the enforcement of a trust, to compel an administrator to account for and distribute assets wrongfully withheld (*Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; *Hayes v. Pratt*, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503); but not to disturb the possession of an administrator rightfully holding the assets (*Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906). When praying an account against executors, all must be joined if more than one (*Howth v. Owens*, 29 Fed. 724; *Conolly v. Wells*, 33 Fed. 210); unless one be nonresident (*Plume & A. Mfg. Co. v. Baldwin*, 87 Fed. 785), and may be dispensed with under U. S. Rev. Stat. sec. 737, or if the executor has not administered (*Providence Rubber Co. v. Goodyear*, 9 Wall. 791, 19 L. ed. 567; *Conolly v. Wells*, 33 Fed. 210, 211).

When Fraud Intervenes.

A court of equity will take jurisdiction of a suit by a non-resident to set aside a decree of a probate court for fraud (*Arrowsmith v. Gleason*, 129 U. S. 99-100, 32 L. ed. 635, 9 Sup. Ct. Rep. 237; *Johnson v. Waters*, 111 U. S. 668-675, 28 L. ed. 556, 559, 4 Sup. Ct. Rep. 619; *Dodd v. Ghiselin*, 27 Fed. 405; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Arrowsmith v. Gleason*, 46 Fed. 256); or to set aside a fraudulent conveyance made by the decedent, if the probate court has not taken possession (*Hale v. Tyler*, 115 Fed. 834); or to set aside fraudulent allowances by an administrator (*Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; and authorities; *Dodd v. Ghiselin*, 27 Fed. 407); or fraudulent conveyances by the administrator (*Rhino v. Emery*, 18 C. C. A. 600, 37 U. S. App. 575, 72 Fed. 386; *Terry v. Bank of Cape Fear*, 20 Fed. 775; *Marshall v. Holmes*, 141 U. S. 599, 35 L. ed. 874, 12 Sup. Ct. Rep. 62; *Hale v. Tyler*, 115 Fed. 838; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Northern P. R. Co. v. Kurtzman*, 82 Fed. 243; *Daniels v. Benedict*, 50 Fed. 354; *Dodd v. Ghiselin*, *supra*; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 19, and cases cited).

CHAPTER XLIII.

TRUSTEES AS PARTIES.

Equity rule 49, now new rule 37, provides that when real estate is vested in trustees, with power to sell and receive the purchase money and rents and profits of the estate, such trustee may sue alone, without making persons beneficially interested parties to the bill. *Allen-West Commission Co. v. Brashear*, 176 Fed. 121, and cases cited; *Harrison v. Stewart*, 93 U. S. 160, 23 L. ed. 845; *Re E. T. Kenney Co.* 136 Fed. 455, and cases cited; *Bowling Green Trust Co. v. Virginia Pass. & P. Co.* 132 Fed. 921; *Hayes v. Pratt*, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 611, 25 L. ed. 758; *Ritcher v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106, 207; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 548, 89 S. W. 552; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Caylor v. Cooper*, 165 Fed. 757; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119. So, beneficiaries are bound by judgments against the trustee in such cases. *Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 90, 36 L. ed. 357, 12 Sup. Ct. Rep. 650; *Rumsey v. Peoples R. Co.* 154 Mo. 215, 55 S. W. 624; *Fletcher v. Ann Arbor*, 53 C. C. A. 647, 116 Fed. 481; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 519. And it is held that such trustees, in respect to litigation touching the trust property, have the same relative position to the property that executors and administrators hold to the personal estate of the decedent in litigation. *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Allen-West Commission Co. v. Brashear*, 176 Fed. 121, and cases cited; *Denver v. New York Trust Co.* 110 C. C. A. 24, 187 Fed. 890; see new rule 41.

When the subject-matter of a trust is in controversy, all trustees should be made parties, notwithstanding section 737, U.

S. Rev. Stat. This statute does not apply to trustees in the classes of suits provided in equity rule 49, now new rule 37, nor in restraining trustees from certain acts in reference to the trust, or for breach of duty not involving actual fraud. *Wall v. Thomas*, 41 Fed. 621; *Boyd v. Gill*, 21 Blatchf. 543, 19 Fed. 146; *Hazard v. Durant*, 19 Fed. 476. So, one of three trustees has no authority to institute a suit without the others or their knowledge. *McGeorge v. Bigstone Gap Improv. Co.* 88 Fed. 599.

Trustees are always necessary parties in a suit to defeat the trust (*McArthur v. Scott*, 113 U. S. 396, 28 L. ed. 1033, 5 Sup. Ct. Rep. 652; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 122 Fed. 921; *Rejall v. Greenhood*, 35 C. C. A. 97, 92 Fed. 945; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 382, 383, 38 L. ed. 203, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Thayer v. Life Asso. of America*, 112 U. S. 717, 28 L. ed. 864, 5 Sup. Ct. Rep. 355; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762-767; *Guardian Trust Co. v. Whitecliffs Portland Cement & Chalk Co.* 109 Fed. 527; *Vetterlein v. Barnes*, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441); or to enjoin a sale of property under the trust (*ibid.*; *Moody v. Flagg*, 125 Fed. 819; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762); unless fraud charged only against the beneficiary.

So, when suit is brought to recover the property, or to reduce it to possession by the trustee, and his relations to the beneficiary are not affected, then he should sue alone. *Griswold v. Bacheller*, 21 C. C. A. 428, 40 U. S. App. 142, 75 Fed. 473; *Carey v. Brown*, 92 U. S. 172, 23 L. ed. 469; *Sullivan v. Thurmond*, — Tex. Civ. App. —, 45 S. W. 394; *Ross v. Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 548, 89 S. W. 552; *Thompkins v. Thompkins*, 123 Fed. 207; *Dodge v. Tullays*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; *Smith v. Portland*, 30 Fed. 737. But otherwise, beneficiaries should be made parties.

So, seeking to reach the income of a trust estate through the rights and powers of a trustee, he must be made a party. *Spies v. Chicago & E. I. R. Co.* 30 Fed. 398; *Morgan v. Kansas P. R. Co.* 21 Blatchf. 134, 15 Fed. 55; *Barry v. Missouri, K. & T. R. Co.* 22 Fed. 631.

So, a trustee of bondholders refusing to sue must be made a party defendant, or when a trustee holds securities of a corporation to secure outstanding bonds, he should be made a party, in a suit to wind up a corporation. *Miles v. New South Bldg. & L. Asso.* 99 Fed. 4.

So in a suit to cancel a mortgage made by a trustee wrongfully. So in suit to foreclose a trust deed, the trustee should be party defendant. *Maher v. Tower Hotel Co.* 94 Fed. 225.

So in suits against trustees by a stranger seeking to defeat the trust, and the trustee represents the beneficiaries in all things relating to their common interests, the beneficiaries need not be made parties. *Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 845. New rule 37.

Equity rule 50, now new rule 41, provides that in a suit to execute the trusts of a will it is not necessary to make the heir at law a party, unless the plaintiff is seeking to establish the will against the heir at law.

Beneficiaries as Parties.

In suits respecting trust property brought by or against trustees, the beneficiaries are as a general rule, parties with the trustee, except as stated in equity rules 37 and 41, and when a trustee brings suit to recover the property, as heretofore stated. *Ebell v. Bursinger*, 70 Tex. 122, 8 S. W. 77; *Sawyer v. First Nat. Bank*, 41 Tex. Civ. App. 486, 93 S. W. 153; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Preston v. Carten Bros.* 80 Tex. 391, 16 S. W. 17; *Hall v. Harris*, 11 Tex. 303.

In all suits to wind up the trust and distribute the proceeds the beneficiaries should be made parties. *Wescott v. Wayne Agri. Works*, 11 Fed. 303.

In a suit by beneficiaries to compel a corporation to fulfil an agreement in a deed of trust, and not seeking to reach the security, the trustee need not be made a party. *Spies v. Chicago & E. I. R. Co.* 30 Fed. 397.

So a trustee of a corporation mortgage need not, in a suit by the beneficiaries, not affecting the lien, be made a party (*Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 880), when all the beneficiaries are substantially before the court; and this is especially true when the joinder of the trustee may

oust the jurisdiction. Equity rule 47; Lake Street Elev. R. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 114. See Lawrence v. Southern P. Co. 165 Fed. 241.

So beneficiaries may sue without making the trustee a party, when the trustee is without power over the trust property (D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780), or a naked trustee, and when no relief is demanded against him. Lake Street Elev. R. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 120. Holly Mfg. Co. v. Chester Co. 48 Fed. 880-891.

In a suit by beneficiaries a nonresident trustee may not be made a party if four out of five trustees are parties. Stewart v. Chesapeake & O. Canal Co. 4 Hughes, 41, 1 Fed. 361. Beneficiaries having a separate interest in a trust fund may join in an action against the trustee for its loss. Davenport v. Prince, 41 Fed. 323.

When one of several beneficiaries sue to declare and enforce an implied trust, all parties claiming an interest in the trust estate must be made parties. Hall v. Harris, 11 Tex. 303.

When a full investigation of the management of the trust fund is sought, all the beneficiaries must be made parties. Lauriat v. Stratton, 6 Sawy. 339, 11 Fed. 107.

When a trustee refuses to sue, the beneficiaries may sue, but must make the trustee a party defendant, unless the suit comes within one of the exceptions as above stated. Consolidated Water Co. v. San Diego, 92 Fed. 759; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 569; Bowdoin College v. Merritt, 63 Fed. 213; Clyde v. Richmond & D. R. Co. 55 Fed. 448.

Or when the trustee neglects to defend the trust the beneficiaries may do so. Thus they may sue to remove cloud, though trustee has uncontrolled possession for five years. Bowdoin College v. Merrett, 54 Fed. 55.

A beneficiary may bring a suit when the trustee has acquired an adverse right. Webb v. Vermont C. R. Co. 9 Fed. 793. And where fraud has been committed by the trustees, or some of them, the beneficiary may sue some or all; that is, the tort may be considered joint or several. Wall v. Thomas, 41 Fed. 621; Boyd v. Gill, 21 Blatchf. 543, 19 Fed. 145.

Receivers as Parties.

I have already alluded to the cases in which the fundamental grounds of jurisdiction as in citizenship, Federal questions, and amount, arise to affect the right of the receiver to sue, or his liability to be sued, in a Federal court.

Section 3 of the judiciary act of 1888, embodied in sec. 66, chap. 4, new Code, has already been referred to, in which it is provided that every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of *any act or transaction* of his in carrying on the business connected with such property, without the previous leave of the court appointing him, but such suit shall be subject to the equity jurisdiction of the appointing court, if necessary to the ends of justice. *McNulta v. Lochridge*, 141 U. S. 330-332, 35 L. ed. 798-799, 12 Sup. Ct. Rep. 11; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335-340, 45 L. ed. 220-223, 21 Sup. Ct. Rep. 171; *Buckhannon & N. R. Co. v. Davis*, 68 C. C. A. 345, 135 Fed. 710; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *International & G. N. R. Co. v. Wynne*, 57 Tex. Civ. App. 68, 122 S. W. 50; *International & G. N. R. Co. v. Bradt*, 57 Tex. Civ. App. 82, 122 S. W. 59; *J. J. Case Plow Works v. Finks*, 26 C. C. A. 46, 52 U. S. App. 253, 81 Fed. 529; *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 494; *St. Louis S. W. R. Co. v. Holbrook*, 19 C. C. A. 385, 41 U. S. App. 33, 73 Fed. 112; *Erb v. Morasch*, 177 U. S. 585, 44 L. ed. 898, 20 Sup. Ct. Rep. 819; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 118 Fed. 205. And the judgment obtained is conclusive on the Federal court as to the right to recover, but time and manner of payment rests with the Federal court. *Willcox v. Jones*, 101 C. C. A. 84, 177 Fed. 870.

Prior to this act, as has been said, it was a well-settled rule, and is now, except as limited by this section of the act of 1888, that a receiver could not be made a party defendant without leave of the court appointing him.

The rule now is, a receiver can be made a party defendant in any court, State or Federal, without leave of the appointing court, whenever the cause of action is based on *some act or transaction* of the receiver in administering the trust. If the

cause of action does not come within the terms of the act, then you must obtain permission of the appointing court to make him a party defendant, or you subject your case to dismissal, or the judgment obtained to be declared void. *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 737; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 734; *Grosscup v. German Sav. Bank*, 162 Fed. 951. U. S. Rev. Stat. sec. 614, does not authorize suit without permission, as to such acts and transactions as come within the rule. See *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 496, and authorities. See *McNulta v. Lockridge*, 141 U. S. 329-331, 35 L. ed. 797-799, 12 Sup. Ct. Rep. 11, where any act or transaction of his was held to extend to the acts of his predecessors.

As to such *acts* and *transactions* the suits against receivers are taken out of the class of ancillary suits, and become original suits against receiver (*Gilmore v. Herrick*, 93 Fed. 526; *Pitkin v. Cowen*, 91 Fed. 599); and, as we have seen, the ground of Federal jurisdiction is important (*ibid.*).

When the receiver, however, is winding up an insolvent estate, and he sues for property belonging to the fund, or the foreclosure of a mortgage in behalf of the fund (*Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Bowman v. Harris*, 95 Fed. 917; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497; *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.* 93 Fed. 689; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 280); or when permission is given by the court appointing the receiver, to sue him as to some claim or right in and to the property in the hands of the court (*Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 735; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279-280); or on a cause of action not arising out of any act or transaction of the receiver, as a bill in equity to collect assessments on stock (*Myers v. Hettinger*, 37 C. C. A. 269, 94 Fed. 372; *Bausman v. Denny*, 73 Fed. 69); or filing bill to quiet title (*Connor v. Alligator Lumber Co.* 98 Fed. 155), then the receiver may sue or be sued in the court appointing him, without reference to amount or citizenship, as the suit in such cases would be only ancillary to the main suit. *White v. Ewing*, 159 U. S. 39, S. Eq.—17.

40 L. ed. 68, 15 Sup. Ct. Rep. 1018; *Carpenter v. Northern P. R. Co.* 75 Fed. 850; *Ray v. Pierce*, 81 Fed. 882; *Bottom v. National R. Bldg. & L. Asso.* 123 Fed. 744; *Root v. Woolworth*, 150 U. S. 413, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136; *Rouse v. Letcher*, 156 U. S. 49-50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

A receiver of a national bank is not a necessary party to a suit to enforce a claim against the bank. *Denton v. Baker*, 24 C. C. A. 476, 48 U. S. App. 235, 79 Fed. 189; *Speckert v. German Nat. Bank*, 38 C. C. A. 682, 98 Fed. 153; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 384, 20 L. ed. 840.

A receiver need not be made a party when an ancillary suit is filed to foreclose a mortgage on property in the hands of a receiver (*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 642); nor when he has surrendered the property sued for (*Phelps v. Elliott*, 29 Fed. 53).

Power to Sue in a Foreign Jurisdiction.

The appointing court cannot give a receiver power to sue in another court of foreign jurisdiction, or go there and take possession of property (*Booth v. Clark*, 17 How. 328, 15 L. ed. 166; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; *Hale v. Allinson*, 188 U. S. 56-68, 47 L. ed. 380-388, 23 Sup. Ct. Rep. 244; *Edwards v. National Window Glass Jobbers Asso.* 139 Fed. 797; *Fowler v. Osgood*, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 20; *Hilliker v. Hale*, 54 C. C. A. 252, 117 Fed. 220); even though ordered by the appointing court. (*Great Western Min. & Mfg. Co. v. Harris*, supra). *Hale v. Hardon*, 89 Fed. 283; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Fairview Fluor Spar & Lead Co. v. Ulrich*, 113 C. C. A. 372, 192 Fed. 897; *McBride v. Oriental Bank*, 200 Fed. 895.

However, there are exceptions to the rule, as where the title is in the receiver, or a statute vests authority to do so. See *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Irvine v. Bankard*, 181 Fed. 208; *Strout v. United Shoe Machinery Co.* 195 Fed. 314; *Irvine v. Putnam*, 190 Fed. 321.

CHAPTER XLIV.

PARTIES IN REMOVING CLOUD AND QUIETING TITLE.

Removing cloud from title has already been discussed in my lectures on Equity Jurisprudence, and I will simply state the rule of parties as applied in the Federal courts.

First. The bill can be filed by the party in possession having the legal title (*Wehrman v. Conklin*, 155 U. S. 325, 39 L. ed. 173, 15 Sup. Ct. Rep. 129; *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Kraus v. Congdon*, 88 C. C. A. 182, 161 Fed. 18; *Kennedy v. Elliott*, 85 Fed. 832; *Union Mill & Min. Co. v. Warren*, 82 Fed. 519; *Frost v. Spitley*, 121 U. S. 556, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 163, and cases cited; *United States Min. Co. v. Lawson*, 115 Fed. 1007), because, being in possession, he cannot bring trespass to try title, and therefore has no adequate remedy at law to protect his enjoyment. (*Harding v. Guice*, *supra*.)

Second. It cannot be filed by a party having the legal title and out of possession, notwithstanding State statutes permit it (*Hudson v. Randolph*, 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 217; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 642, 47 L. ed. 633, 23 Sup. Ct. Rep. 434; *Northern P. R. Co. v. Amacker*, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 537; *Gordon v. Jackson*, 72 Fed. 89); *except* in cases where there is no adequate remedy at law and relief in equity is necessary, as in cases of wild lands clouded by tax titles, and purchasers not in actual possession (*Gordon v. Jackson*, 72 Fed. 88; *Gillis v. Downey*, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483, 19 Mor. Min. Rep. 253; *Wehrman v. Conklin*, 155 U. S. 328,

39 L. ed. 174, 15 Sup. Ct. Rep. 129; *Hudson v. Randolph*, 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 216; *Kilbourn v. Sunderland*, 130 U. S. 505-515, 32 L. ed. 1005-1009, 9 Sup. Ct. Rep. 594; *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 165; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 557, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; See *Davidson v. Calkins*, 92 Fed. 231); or as to mining lands (*Willitt v. Baker*, 133 Fed. 937; *Gillis v. Downey*, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483, 19 Mor. Min. Rep. 253; *Carter v. Thompson*, 65 Fed. 329, 18 Mor. Min. Rep. 134); or oil lands (*Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839. See *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630). So it may be stated.

Third. That the bill can be filed when neither party is in possession and plaintiff has the legal title, because there can be no controversy in law if neither party is in possession. *Holland v. Challen*, 110 U. S. 15-26, 28 L. ed. 52-56, 3 Sup. Ct. Rep. 495; *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769; *Southern P. R. Co. v. Goodrich*, 57 Fed. 880; *Southern P. R. Co. v. Stanley*, 49 Fed. 264, 265.

Fourth. The bill cannot be filed against the defendant in possession (*Taylor v. Clark*, 89 Fed. 7; *Gordan v. Jackson*, 72 Fed. 89; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Gombert v. Lyon*, 80 Fed. 305; *Davidson v. Calkins*, 92 Fed. 232-236; *Adoue v. Strahan*, 97 Fed. 692), whether permitted by the State law or not, because ejectment is an adequate remedy at law. *Ibid.* *Rudland v. Mastic*, 77 Fed. 689; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Blythe v. Hinckley*, 84 Fed. 256; *Davidson v. Calkins*, 92 Fed. 239.

Then in these cases the bill must show that either the plaintiff is in possession, or that neither party is in possession; otherwise it cannot be filed. *Southern P. R. Co. v. Goodrich*, 57 Fed. 880; *Davidson v. Calkins*, 92 Fed. 239.

But it seems that, though an action at law was the proper remedy because of the position of the parties as to the property, yet where a bill was filed and both parties treated it as an equity suit, a decree will be enforced and not set aside. *Book v. Justice Min. Co.* 58 Fed. 828, 829.

CHAPTER XLV.

DEFECT OF PARTIES AND ISSUE.

It has been seen that the principle on which a court of chancery acts is to dispose of the whole subject-matter in one suit and bind the rights of all persons interested in it. So a "defect of parties" is a good defense, unless under the 4th clause of new rule 25, providing that if any person other than those named as defendants shall be necessary or proper parties, the bill shall aver the reason they are not made parties, by showing they are out of the jurisdiction, or cannot be joined without ousting the jurisdiction of the Federal court as to other parties, and if out of the jurisdiction, the bill should further ask that they should be made parties if they should come within the jurisdiction. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791; *Story v. Livingston*, 13 Pet. 375, 10 L. ed. 207.

So if necessary parties that can be reached, and their presence does not oust jurisdiction, or indispensable parties, whether they can be reached or not, are wanting in the bill, you must object by motion or in the answer under new rule 29. See new rule 43 as to setting up defect and hearing upon the issues;—and see new rule 44 as to the effect of not setting up a defect of parties by motion or answer. If the defect is apparent the issue whether raised in a motion, or in the answer, should be in the nature of a demurrer. See *Alexander v. Fidelity Trust Co.* 215 Fed. 791. And in either event, the proper parties should be named. *Dwight v. Central Vermont R. Co.* 9 Fed. 785. And the same rule applies in misjoinder if that be the objection, or where parties are made who have no interest. See *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Conolly v. Wells*, 33 Fed. 205; *Halstead v. Manning*, 34 Fed. 565; *Elkhart*

Nat. Bank v. Northwestern Guaranty Loan Co. 84 Fed. 76; House v. Mullen, 22 Wall. 46, 22 L. ed. 839. However, the addition of a party having no interest may be struck out on motion. Hubbard v. Manhattan Trust Co. supra; Badger Silver Min. Co. v. Drake, 31 C. C. A. 378, 58 U. S. App. 129, 88 Fed. 52. If the objection is that it appears that a certain party named should be a party to the bill, or a party to the bill should not have been made, you may use the following forms:

A. B. } vs. } C. D. }	In the District Court of the United States for the District of Sitting at
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And now comes the defendant and moves the Court to dismiss the bill filed in the above cause, for that it appears that one G. H. is a necessary (or indispensable party) and has not been made a party to the bill (point out briefly the allegations of the bill showing that the person named is a necessary or indispensable party in further proceedings and should be joined.) Prayer—for dismissal of bill with costs.

If the objection goes to a misjoinder, use same form, changing allegations to such facts.

Where the nonjoinder (or misjoinder) of parties is not apparent, but the fact exists, then, with title and commencement as before, proceed as follows:

And for answer to said bill aver and say that one E. G. is a necessary (or indispensable) party (if necessary, allege that he is a citizen of and residing in———, showing he is within the jurisdiction of court) to said bill, because (here state why he is a necessary or indispensable party); all of which matters this defendant avers to be true, and pleads the same in abatement (or in bar) of complainant's bill, and prays judgment, etc. (as before).

R. F.,
Solicitor.

If for misjoinder change allegations to suit facts.

While this is the regular course of pleading in equity, and may be used in case of defect of parties, yet the Supreme Court of the United States has promulgated two rules making such speedy disposition of all objections and suggestions as to parties that nothing but time is gained, or rather, wasted, in filing a plea in such cases. United States v. Gillespie, supra.

Equity rule 52, now new rule 43, provides that where the defendant shall by his answer suggest that the bill is defective for

want of parties, the plaintiff shall be at liberty, in fourteen days after answer filed, to set down the cause for argument on the objection only, and the purpose for which the same is so set down shall be notified by an entry to be made in the clerk's order book to the effect following: "Set down for hearing on defendant's objection for want of parties."

This action is taken by plaintiff by simply addressing a note to the clerk to enter the order as above stated in the order book. This should be done, for the rule proceeds, "and when the plaintiff shall not set down his cause and proceed to a hearing, then, if defendant's objection be allowed, the plaintiff will not be entitled, as a matter of course, for an order to amend by adding parties, but the court is at liberty to dismiss his bill."

Equity rule 53, now new rule 44, provides that if the defendant shall at the hearing of a cause object that a suit is defective for want of parties, not having made the objection by plea or answer, and therein specified by name or description of parties to whom the objection applies, the court may, in its discretion, make a decree saving the rights of the parties not joined.

By these rules it is seen that a suggestion in the answer of a defect of parties is all that is necessary to raise the issue, and instead of having to wait the ordinary time under the rules for a hearing, the plaintiff may, in fourteen days from filing the answer, settle the preliminary matter of parties, having those added that should be joined, or eliminating those improperly joined. To induce the plaintiff to pursue this rule, it is declared on failure to do so that he loses his right of amendment as of course, and subjects his bill to dismissal by the court should it appear that the suggestion of the defendant as to parties should be found true at the final hearing.

On the other hand, equity rule 53, now new rule 44, in order to induce the defendant to make the suggestion of a want of parties by answer, the court can, if the defendant waits until the final hearing to raise the question, proceed in disregard of the suggestion then, and enter a decree on the case, saving the rights of absent parties. *Mechanics' Bank v. Seton*, 1 Pet. 299-306, 7 L. ed. 152-155; *Keller v. Ashford*, 133 U. S. 626, 33 L. ed. 674, 10 Sup. Ct. Rep. 494. This rule, however, cannot apply when the absent parties are indispensable, but only when necessary parties or proper parties. The absence of indis-

pensable parties prevents the court from proceeding, except to dismiss without prejudice, as before seen. *Young v. Cushing*, 4 Biss. 456, Fed. Cas. No. 18,156; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152.

It is further apparent by these rules that any objection for want of parties or misjoinder of parties, whether raised by motion, or by suggestion in the answer, must point out and name the persons not joined or misjoined, and give reasons for the objection. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, supra; *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Harvey v. Richmond & M. R. Co.* 64 Fed. 20; *United States v. Pratt Coal & Coke Co.* 18 Fed. 708.

But there are other grounds than those of non-joinder or misjoinder, the existence of which creates a defect of parties, and which should be raised and settled *in limine* by motion, or suggestion in the answer.

Any person having an equitable right or remedy may, if *sui juris*, sue in his own name, and if not, may sue in the name of another, and the defendant has the right to have on the record some person *sui juris* who would be answerable for costs and bound by a decree. So, infancy, coverture, lunacy, or the non-existence of the character or capacity in which the party is suing, or the parties are sued, such as partners, executors, administrators, trustees, or heirs, should be met by motion or answer at once, and settled *in limine*.

By new rule 43 it is clearly indicated that matters in abatement touching the character and capacity of parties should be settled *in limine*.

Many of the Federal districts have local rules requiring all matters in abatement to be set up by preliminary answer in the nature of a plea, and upon issue joined the court determines it before the defendant is required to answer to the merits. *Marshall v. Otto*, supra.

If any of these objections be raised by the defendant, you may use the form given for want of parties, except the stating part must present the specific objection, thus:

Where the bill is exhibited by an infant without next friend, you insert:

"That said plaintiff, before and at the time of filing his said bill, was and now is an infant under the age of twenty-one years, wherefore judgment is prayed," etc.

In the case of lunacy say:

"That plaintiff has been declared a lunatic by virtue of inquiry duly and legally made and judgment thereon, to which defendant asks leave to refer; that said judgment has never been set aside and remains in full force and effect," etc.

Florida C. & P. R. Co. v. Bell, 31 C. C. A. 9, 59 U. S. App. 189, 87 Fed. 369; Dudgeon v. Watson, 23 Blatchf. 161, 23 Fed. 161.

Or in case plaintiff or defendant are not administrators, etc., being the capacity in which they sue, or are being sued, the motion or answer by the defendant must set up the fact clearly.

You must set up:

"That at the time of bringing the suit the so-called intestate was not dead and plaintiff could not be an administrator, or that letters of administration had been revoked, if they ever existed."

Or if defendant is sued as administrator, and is not, he must set up:

"That he was not at the time of filing the suit nor prior thereto (if such is the fact), nor is he now, administrator of A. B., as alleged, but the allegations seeking to charge him as administrator are not true," etc.

If it is a case of coverture, you may set up:

"That A. B. at the time of exhibiting the bill was then, and is now, a married woman, one.....being then, and is now, her husband, and fully capacitated to institute this suit in her behalf." Or. if sued, she may reply her coverture in the same way.

In each case the title, commencement, and form as given in the plea may be used.

Making New Parties by Amendment.

New parties may be made by amendment by plaintiff (Insurance Co. of N. A. v. Svendsen, 74 Fed. 348), so may strike out; and defendant may force new parties by plea of non-joinder (Goodman v. Niblack, 102 U. S. 563, 26 L. ed. 232; Shields v. Barrow, 17 How. 145, 15 L. ed. 162; Lewis v. Dar-

ling, 16 How. 8, 14 L. ed. 822; Leahy v. Haworth, 4 L.R.A. (N.S.) 657, 73 C. C. A. 84, 141 Fed. 855; Kaiser v. General Phonograph Supply Co. 171 Fed. 432). See Lusk v. Kimball, 87 Fed. 545. Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 261; McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171. As to setting down the issue of defect of parties for hearing, see chap. 69, p. 426.

CHAPTER XLVI.

THE BILL.

The bill is the petition to the court containing the complaint and relief desired. In the old forms the complainant was styled "orator" or "oratrix," but this has gone into disuse, although occasionally used in some of the States, and the customary phrase, "plaintiff," is used.

The historical development of the present bill in equity, while interesting, is of no practical importance; I will therefore briefly allude to only two stages in its development, and the causes for the form it now assumes.

Anciently the complainants made to the chancellor their complaints verbally, and the defendant brought in and compelled to answer under oath the charges made. In process of time the charges were reduced to writing, and questions formulated in the petition for the defendant to answer. The petition thus framed was called a bill, and the defendant was required to answer in writing to each specific question, without evasion.

In this way the conscience of the defendant, through fear of ecclesiastical punishment, was purged, discovery had, and the answer thus made performed the double function of pleading and proof.

With the gradual development of the chancery practice, the bill assumed a stated form and was divided into nine parts:

First. Title and address to court.

Second. Names and places of abode of plaintiff and defendant.

Third. Stating part of bill, or statement of case.

Fourth. Confederacy clause. Alleging unlawful combination of the defendant to injure, etc., the plaintiff.

Fifth. Charging part of the bill, so called, because the plaintiff, by anticipation, charged that the defendant would set

up certain excuses and pretenses to defeat plaintiff's right, which plaintiff denied or avoided in his bill.

Sixth. Jurisdiction clause. That plaintiff was remediless at law.

Seventh. Interrogatory part, in which the plaintiff sought, by questions based on the stating part of his bill, to make discovery by purging the conscience of the defendants as to the truth of the statements made.

Eighth. Prayer for relief.

Ninth. Prayer for process.

It was long necessary to adhere to these formal divisions to sustain a bill in equity, but as the perplexity of business increased with an advancing civilization, and greater breadth of jurisdiction was acquired, it was found that adherence to these divisions unduly lengthened the bill and rendered them very obscure. Lord Chancellor Campbell declared that he remembered when bills in equity told the same story over and over again, and each time more obscurely. Prolixity, tautology, scandal, and impertinence became the leading features in a bill in equity.

It was sought to overcome this fault in England by confining the bill to fifteen sheets, but the chancery lawyer met this rule by enlarging the sheets, and this evasion carried to such an extent that a further order was promulgated allowing only fifteen lines to a sheet. *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 57; Story, Eq. Pl. § 226. These conditions may be said to have existed when the practice of the High Court of Chancery of England was adopted in our Federal system.

The Supreme Court of the United States, to overcome these cumbersome methods promulgated rules practically reducing the form of the bill to four divisions, and otherwise greatly simplifying its structure.

By old equity rule 21 you could omit the confederacy clause, the charging part of the bill, and the jurisdictional clause. *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406. So the parts retained by new rule 25 are as follows:

1st Title of case and address to the court.

2d The full name when known of each plaintiff and defendant and the citizenship and residence of each party, and if any party be under disability the fact must be stated.

3d A short and plain statement of the grounds upon which the court's jurisdiction depends.

4th A short and simple statement of the ultimate facts upon which relief is asked omitting any statement of evidence.

5th If there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties; as parties not within the jurisdiction or jurisdiction would be ousted if made parties.

6th Prayer for relief; if special relief asked pending suit, a statement to support must be set forth in the bill and the bill must be verified. See *Alexander v. Fidelity Trust Co.* 215 Fed. 79; *Maine Lumber Co. v. Kingfield Co.* 218 Fed. 902.

Each of these parts I will now discuss. Equity rule 25 requires that the introductory part of the bill shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. *United States v. Pratt Coal & Coke Co.* 18 Fed. 708; *Atlantic Coast Line R. Co. v. Whilden*, 115 C. C. A. 254, 195 Fed. 263.

The form should be substantially as follows:

A. B. } vs. } C. D. }	In the District Court of the United States for the.....District of....., sitting at.....
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To the Judges of the District Court of the United States for the..... District of Texas:

A. B., a citizen of the State of....., residing in.....county, in said State, brings this his bill against C. D., a citizen of the State of....., and residing in.....county, in said State.

And therefore complainant (or plaintiff or your orator) complains and says that, etc.

If the bill is by a corporation, or against a corporation, you may say:

The (name of corporation), a corporation duly organized by and existing under the laws of the State of, and having its principal place of business at, in said State, and a citizen of said State, humbly complains, etc.

If the suit be against a corporation, proceed and say, "humbly complains of the (name of corporation), a corporation organized and existing under the laws of the state of, and having its principal place of business at, in

said State, and a citizen and inhabitant of the District, in same State.”

The simple allegation that a corporation is a citizen of a State is not sufficient (*Swafford v. Templeton*, 108 Fed. 309); you must set forth a corporate name, followed by the averment that the same is a corporation created under the laws of the State of and having its principal place of business at *Shiras*, Eq. Pr. § 34; *Knight v. Litcher & M. Lumber Co.* 69 C. C. A. 248, 136 Fed. 404; *Mueller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Dalton v. Milwaukee Mechanics Ins. Co.* 118 Fed. 876; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696; *DeLay v. Travelers Ins. Co.* 59 Fed. 319; *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 504; *Lee v. Atlantic Coast Line R. Co.* 150 Fed. 800; *Winkler v. Chicago & E. I. R. Co.* 108 Fed. 305; *St. Louis, I. M. & S. R. Co. v. Newcom*, 6 C. C. A. 172, 12 U. S. App. 503, 56 Fed. 951; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 627. See *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 480.

In *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 192 and *United States v. Harsha*, 6 C. C. A. 178, 16 U. S. App. 13, 56 Fed. 953, “Corporation duly incorporated by law, having principal place of business in Massachusetts,” held, not good. “That defendant is a corporation conducting a railroad in another State,” held, not good. *Parker-Washington Co. v. Cramer*, 120 C. C. A. 216, 201 Fed. 878; *Farmers’ Oil & Guano Co. v. Duckworth Co.* 133 C. C. A. 278, 217 Fed. 363; *Atlantic Coast Line R. Co. v. Whilden*, 115 C. C. A. 254, 195 Fed. 263.

It has always been required in bills in equity that the names and places of residence of the plaintiff should be carefully set forth, but its purpose was to prevent fictitious persons from bringing suit, and that the defendant might show where to resort to compel obedience to any order of the court, such as to pay costs that may be awarded; but the accurate statement required in the Federal system is essential to show jurisdiction, when dependent on diversity of citizenship, as heretofore explained.

The great majority of cases brought into the circuit courts of the United States are dependent for jurisdiction on diversity of citizenship, and whether brought into said courts originally or by removal from State courts, or citizenship and alienage, it is a universal rule that the jurisdiction of these courts must appear in the bill, or in other parts of the record. *Grace v. American Cent. Ins. Co.* 109 U. S. 284, 27 L. ed. 935, 3 Sup. Ct. Rep. 207; *McEldowney v. Card*, 193 Fed. 482 and cases cited; *Wolfe v. Hartford Life & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *United States v. Harsha*, *supra*; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 662, 42 L. ed. 316, 17 Sup. Ct. Rep. 925; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; *Sharon v. Hill*, 10 Sawy. 634, 23 Fed. 353, 355.

When dependent on diversity of citizenship the bill must not only show diversity of citizenship, but it must affirmatively show that it is brought in a Federal district of the State in which either the plaintiffs or defendants are resident citizens, as before explained. Authorities above; *Donnelly v. United States Cordage Co.* 66 Fed. 613; *Bank of Winona v. Avery*, 34 Fed. 81. (See "Federal District of Suit.") And it is not to be inferred. *Wolfe v. Hartford Life & Annuity Ins. Co.* and *United States v. Harsha*, *supra*; *Lownsdale v. Gray's Harbor Boom Co.* 117 Fed. 983. See *Tonopah Traction Min. Co. v. Douglass*, 123 Fed. 936. You cannot allege that "parties were citizens of states other than the State of," or that one claims to be a citizen of," etc. (*Lownsdale v. Gray's Harbor Boom Co.* *supra*); or that defendants are citizens of (a) or (b) (*Van Horn v. Kittitas County*, 112 Fed. 1). It is not necessary to repeat jurisdictional averments in an amendment to the bill. *Mexican C. R. Co. v. Pinkney*, 149 U. S. 200, 37 L. ed. 701, 13 Sup. Ct. Rep. 859; *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 459, 460, 43 L. ed. 767, 19 Sup. Ct. Rep. 451. It is the party named in the bill that controls, not those that may be proper or even necessary. *Re Stutsman County*, 88 Fed. 337. As said above, you cannot infer citizenship and residence, nor can you allege that their State residence is un-

known; they must be citizens of a named State. *Tracy v. Morel*, 88 Fed. 801; *Tug River Coal & Salt Co. v. Brigel*, supra. You can allege, it seems, that a defendant is a citizen of the United States and a resident of a State. *Littell v. Erie Co.* 105 Fed. 539; *Clausen v. American Ice Co.* 144 Fed. 723.

Citizenship Not Residence.

You cannot aver simply residence; it must be citizenship. Citizenship is the test. *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 382, 48 L. ed. 1029, 24 Sup. Ct. Rep. 696; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 732; *Denny v. Pironi*, 141 U. S. 123, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 655, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709; *Timmons v. Elytown Land Co.* 139 U. S. 379, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Sharon v. Hill*, 26 Fed. 342; *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 623; *Marks v. Marks*, 75 Fed. 321; *Wolfe v. Hartford Life & Annuity Ins. Co.* supra; *Crosby v. Cuba R. Co.* 158 Fed. 145-152; *Sanbo v. Union P. Coal Co.* 72 C. C. A. 24, 140 Fed. 713; *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188. If only allegation of residence, the Supreme Court would reverse the case, though no objection taken. *Preferred Acci. Ins. Co. v. Barker*, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814. The term "inhabitant" cannot be substituted for "citizenship." *Allen B. Risley Co. v. George E. Rouse Soap Co.* 32 C. C. A. 496, 62 U. S. App. 240, 90 Fed. 6. As to sufficient allegation of citizenship, see authorities above; *United States v. Harsha*, supra; *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696. (See chapter 21.) Must be alleged. *Lownsdale v. Gray's Harbor Boom Co.* 117 Fed. 983. So in regard to an allegation of alienage. An allegation that a party is a resident of London does not show jurisdiction. *Bishop v. Averill*, 76 Fed. 387; *Stewart v. Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268. May be, and not be an alien. But an allegation that parties are all of Cognac, France, and citizens of the Republic of France, is good. *Hennessey v. Richardson Drug Co.* 189 U. S. 25, 47

L. ed. 697, 23 Sup. Ct. Rep. 532; *Von Voight v. Michigan C. R. Co.* 130 Fed. 398; *Mahoning Valley R. Co. v. O'Hara*, 116 C. C. A. 495, 196 Fed. 947; *C. H. Nichols Lumber Co. v. Franson*, 203 U. S. 282, 51 L. ed. 183, 27 Sup. Ct. Rep. 102. As to allegation of citizenship, see *McEldowney v. Card*, 193 Fed. 482; *Atlantic Coast Line R. Co. v. Whilden*, 115 C. C. A. 254, 195 Fed. 263.

Federal District of Suit.

The statute in case of diversity of citizenship only fixes the venue of suit in the district of plaintiff's residence, or in the district of defendant's residence. It is necessary to specifically allege the venue as required, and it must be shown that the suit is brought in the district court of the residence of plaintiff, or defendant, if you are depending on diversity of citizenship alone for jurisdiction. *Miller v. Pennsylvania R. Co.* 91 Fed. 298; *United States v. S. P. Shotter Co.* 110 Fed. 2; *Southern P. Co. v. Denton*, 146 U. S. 205, 206, 36 L. ed. 954, 13 Sup. Ct. Rep. 44.

If, however, the county of plaintiff's or defendant's residence and citizenship is alleged, the court will take judicial notice of the district to which the county belongs. But bear in mind that allegations of "residence" only in the county or district is not equivalent to citizenship. *Wolfe v. Hartford Life & Annuity Ins. Co.* supra; *Denny v. Pironi*, 141 U. S. 121-123, 35 L. ed. 657, 658, 11 Sup. Ct. Rep. 966; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 733. Diversity of residence does not give jurisdiction. *Southwestern Teleg. & Teleph. Co. v. Robinson*, 1 C. C. A. 91, 2 U. S. App. 148, 48 Fed. 769; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *Tinsley v. Hoot*, 3 C. C. A. 612, 2 U. S. App. 548, 53 Fed. 682.

Necessity of Accuracy.

The jurisdiction of the court depending on the accuracy and fullness of the statement of the grounds upon which the jurisdiction rests, especially as to citizenship and residence, a failure so to do is fatal to jurisdiction, as every case is without the

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jurisdiction not affirmatively appearing to be in it. *Goeppert v. Compagnie Generale Transatlantique*, 156 Fed. 196-199; *Robertson v. Cease*, 97 U. S. 646-649, 24 L. ed. 1057-1059; *United States v. S. P. Shotter Co.* 110 Fed. 2, 3; *Lownsdale v. Gray's Harbor Boom Co.* supra; *Turner v. Jackson Lumber Co.* 87 C. C. A. 103, 159 Fed. 923; *International Bank & T. Co. v. Scott*, 86 C. C. A. 248, 159 Fed. 59-61; *Jackson v. Virginia Hot Springs Co.* 130 C. C. A. 375, 213 Fed. 973, 974; *Pike County v. Spencer*, 112 C. C. A. 433, 192 Fed. 13. This rule applies only when jurisdiction is dependent upon diversity. *Wright v. Skinner*, 136 Fed. 694. And when a proper allegation is made it makes a prima facie case (*Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 241), which continues until overcome by evidence creating a legal certainty. Where the allegation of citizenship was upon information and belief, it was held insufficient, in *Wolff v. Archibald*, 14 Fed. 369; *Hambleton v. Duham*, 10 Sawy. 489, 22 Fed. 465. See *Holton v. Helvetia-Swiss F. Ins. Co.* 163 Fed. 661. However, it is said in *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 382, 48 L. ed. 1029, 24 Sup. Ct. Rep. 696, that the whole record may be looked to for the purpose of curing defective averment of citizenship, and facts constituting such allegations in legal intentment are sufficient, citing *Horne v. George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Howe v. Howe & O. Ball Bearing Co.* 83 C. C. A. 536, 154 Fed. 822 and cases cited. *Bowers v. New York L. Ins. Co.* 68 Fed. 785; *Lebert v. Hunt*, 108 Fed. 450. In *Adams Exp. Co. v. Adams*, 159 Fed. 62, the defect was held to be cured by answer.

In the appellate courts the case will be dismissed if jurisdiction does not appear in the record, even though the question was not raised in the lower courts. The docket of the Supreme Court of the United States is strewn with wrecks of this character. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382-384, 28 L. ed. 463, 464, 4 Sup. Ct. Rep. 510; *Hancock v. Holbrook*, 112 U. S. 231, 28 L. ed. 715, 5 Sup. Ct. Rep. 115; *Neel v. Pennsylvania Co.* 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; *King Iron Bridge & Mfg. Co. v. Ottoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532,

12 Sup. Ct. Rep. 726. An amendment will not be permitted in the appellate courts when the record nowhere shows jurisdiction. *Jackson v. Allen*, 132 U. S. 29, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Crehore v. Ohio & M. R. Co.* 131 U. S. 242, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616, and cases cited. However, if the averment be made insufficiently it may be amended. *Johnson v. F. C. Austin Mfg. Co.* supra; *Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Glover v. Shepperd*, 11 Biss. 572, 15 Fed. 833.

In stating the necessity of accuracy it is not intended that there must be certainty to a certain intent, but general certainty without minute detail is sufficient.

Statement of the Case.

Old equity rule 26 requires that the statement of the case shall be expressed in as brief and succinct a manner as possible (*Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 488; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 57), and shall contain no unnecessary recitals of deeds, documents, instruments, or contracts *in haec verba*, or any other impertinent matter. *Board of Trade v. National Bd. of Trade*, 154 Fed. 239.

This rule was omitted in the new rules, but the substance was retained in the second and third clauses of new rule 25. Old equity rule 25, to promote brevity, provided a penalty; but this rule has been omitted from the new rules. By new rule 20 a further and better statement of the nature of the claim or better particulars of any matter may be permitted by the court on terms, etc. *Gimbel Bros. v. Adams Exp. Co.* 217 Fed. 318. See also *Todds v. Whitaker*, 217 Fed. 320. A simple statement of the "ultimate facts" as stated in rule 25, means the issuable facts upon which recovery depends. *Maxwell Steel Vault Co. v. National Casket Co.* 205 Fed. 525; *Crim v. Rice*, — C. C. A. —, 232 Fed. 570.

There are four component parts to make a complete case.

First. The bill must show that the complainant is the person entitled to relief.

Second. That the facts entitle complainant to relief.

Third. That the defendant is the person from whom the complainant should recover.

Fourth. That the claim set up is equitable.

To these may be added that if the case rests upon a Federal question, it must be shown in the statement of the case, and the amount, or value, of the subject-matter must be such as to give the jurisdiction.

These requirements of "statement" express a general formula in stating the case. I will now discuss them in detail and in the order stated. *Hobbs Mfg. Co. v. Gooding*, 100 C. C. A. 83, 176 Fed. 264, 265; *United States v. American Bell Teleph. Co.* 32 Fed. 593.

First. You must show the plaintiff has a right to the thing demanded, or such interest in it that he may sue.

The bill must set forth some title or interest in the property, contract or right which is the subject-matter of the litigation, and in respect of which he is about to suffer the injury complained of. If it be tangible property, he must show title, right, ownership, or possession. If it be a contract, he must show that he is a party to it originally, or by assignment. If it be a right out of which flows a duty, he must show a right to the performance of the duty. *Taylor v. Holmes*, 14 Fed. 499; *Savage v. Worsham*, 104 Fed. 18; *Selz v. Unna*, 6 Wall. 334, 18 L. ed. 801.

In setting forth the title, interest, or claim, facts, not inferences, must be alleged, nor can you rest upon conclusions of law. Mere averment of legal conclusion not good pleading. *Fuller v. Montague*, 8 C. C. A. 100, 16 U. S. App. 391, 59 Fed. 215; *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 676; *Gould v. Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 419; *Cornell v. Green*, 43 Fed. 107; *Dishong v. Finkbiner*, 46 Fed. 17; *Lumley v. Wabash R. Co.* 71 Fed. 28; *Butler v. National Home*, 144 U. S. 74, 36 L. ed. 352, 12 Sup. Ct. Rep. 581; *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476.

To illustrate: You should not allege simply that you are entitled to an equitable interest by virtue of an instrument, but you must state so much of the instrument as shows the interest or claim set up, and let the court determine the effect or character of the interest claimed. *Marshall v. Turnbull*, 34 Fed. 827; *Electric Goods Mfg. Co. v. Kiltonski*, 171 Fed. 552, 553. Set up always your facts; then there is no objection to

drawing conclusions in your bill, which you think legitimate. *Berwind v. Canadian P. R. Co.* 98 Fed. 158; *Allen v. O'Donald*, 23 Fed. 576. However, in this you must bear in mind the 3d clause of new rule 25, requiring a short and simple statement of *ultimate facts*, omitting any mere statement of evidence. *Maxwell Steel Vault Co. v. National Casket Co.* 205 Fed. 515-525. Much must be left to the discretion and good sense of the pleader.

Of course, if your right depends on the construction of the whole instrument, you may set it up in your bill *in haec verba*, without making your pleading obnoxious to the rule. *Einstein v. Schnebly*, 89 Fed. 541-549; *Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 486. The interest thus to be stated applies to every plaintiff, if there be more than one, and must be an actual existing interest, and not a probability; and whenever conditions precedent to the maturing of the interest appear, you must allege performance or tender of performance. *Ibid.* The statement should not be uncertain; if it is, the objection should be raised by motion. *Einstein v. Schnebly*, 89 Fed. 547; *Johnson v. Wilcox & G. Sewing Mach. Co.* 25 Fed. 373.

Second. It must appear that plaintiff is entitled to relief.

Mr. Heard remarks that this requirement in the stating part of the bill does not involve so much a question of pleading, but rather covers the whole subject-matter of equitable jurisdiction. This is true, and all that can be said by way of general direction is that when the title or interest claimed appears in the bill, then you must state the injury or deprivation of right clearly and accurately (*Savage v. Worsham*, *supra*; *Boston & A. R. Co. v. Parr*, 44 C. C. A. 139, 104 Fed. 695; *Knopholler v. St. Paul, M. & M. R. Co.* 1 McCrary, 299, 2 Fed. 302; *Bent v. Hall*, 56 C. C. A. 246, 119 Fed. 342; *Bishop v. York*, 118 Fed. 352); that the court may see that the relief you ask is not only equitable, but consistent with the claim set up.

A plaintiff may sue in equity on a promise to a third person. *Green v. Turner*, 30 C. C. A. 427, 59 U. S. App. 252, 86 Fed. 838, and cases cited; *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831.

Under old rule 21 you could in the bill anticipate the defense, and meet it by proper allegations, but this rule has been omitted from the new rules.

Third. It must appear that the defendant is the party from whom the plaintiff should recover.

The bill must show that the defendant is liable. Of course, if he is in possession of the property sued for; or if the subject-matter of his suit is based on contract to which he is a party; or if he owe a duty, which in equity of good conscience he should perform,—then the statement of these conditions would be sufficient to show liability, if plaintiff shows an interest or right. The rule of precision in allegation is not applicable when it is necessary to show what claims the defendant sets up, or what interest, if any, he claims, as plaintiff cannot be supposed to know always the nature of the defendant's interest, especially when it can only be reached by discovery.

It sometimes happens that while plaintiff may have an interest in property in the hands of another, yet there is not that privity between them that will sustain a suit, so it must appear from the bill, not only that the interest exists, but that the status of the defendant to plaintiff and the subject-matter is such that the suit will lie, and the defendant is the party from whom the plaintiff should recover.

Fourth. That the claim set up is an equitable one.

This requirement has been fully discussed in the application of section 723, U. S. Rev. Stat. in bringing suits in equity. It is a fundamental rule that a bill in equity must state a case within the jurisdiction of a court of equity, and this, as you have seen, is shown either where the interest claimed is cognizable in equity, or whatever be the nature of the claim, if the complainant is entitled to relief in equity, because the remedy at law is inadequate. *Kansas City Southern R. Co. v. Quigley*, 181 Fed. 190; *Pullman Co. v. Tumble*, 173 Fed. 203, and cases cited.

Joinder of Causes of Action.

By new rule 26 the plaintiff may join in one bill as many equitable causes of action as he may have against the defendant. If, however, there be more than one plaintiff, the cause of action must be joint, and if more than one defendant the liability must be asserted against all material defendants, or sufficient grounds must appear for uniting the causes of action to

promote the convenient administration of justice. If this does not appear, the court may order separate trials. So each cause of action must be separately stated, and complete in itself, though prior allegations may be referred to avoid repetition. *Maxwell Steel Vault Co. v. National Casket Co.* 205 Fed. 515; *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 381. You cannot join legal and equitable causes of action entirely disconnected. *Bucyrus Co. v. McArthur*; 219 Fed. 267. Nor where the nature of the cause of action gives jurisdiction to the court can you join a cause of action between parties which requires diversity of citizenship to give jurisdiction in which diversity does not exist. *Vose v. Rosebuck Weather Strip & Wire Screen Co.* 210 Fed. 687. (See chap. 50 for further discussion.)

The new rule seems to be self-explanatory, except in the provision "that different causes of action may be joined where it appears that sufficient grounds for uniting the causes of action may be permitted to promote the convenient administration of justice." This means that where there is a joinder of several causes of action not coming strictly within the specific grounds as set forth in the rule, the court's discretion must determine whether the suit can be further prosecuted as brought. Of course, where discretion prevails there can be no fixed rules. Again, the new rule 26 has rendered obsolete the doctrine of multifariousness, which forbids the stating of separate and distinct causes of action, or distinct claims, in the same bill. (See chap. 50 for exceptions.) However, the saving clause in the new rule is that if the court determines that it would be inconvenient to dispose of the case as brought, the court may order separate trials of the several causes of action in the bill.

Allegation of the Federal Question.

When the jurisdiction depends on a Federal question, the stating part of the bill must show that the suit arises under the Constitution and laws of the United States or treaties made, as has been before fully explained (see "Federal Questions," Chap. 24). *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 341-344; *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 877; *Indiana use of*

Delaware County v. Alleghany Oil Co. 85 Fed. 872; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Chappell v. Waterworth, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama), 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; East Lake Land Co. v. Brown, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; Walker v. Collins, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738. The rule is that the Federal question must appear in the bill itself (Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35, and authorities above), and the bill must show a reliance upon it (Pacific Gas Improv. Co. v. Ellert, 64 Fed. 421). See United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769 where the allegation of a Federal charter was held sufficient. See chap. 26.

Allegation of Amount.

In the statement of the case the allegation of amount should show that the value of the subject-matter or amount in dispute is within Federal jurisdiction, that is, exceeds the sum of three thousand dollars, exclusive of interest and costs, and this must appear whether the jurisdiction be based on diversity of citizenship, or a Federal question, or between a citizen and an alien. I have already discussed this element of jurisdiction, and given the line of authorities controlling it, and covering such questions as may reasonably arise in determining it. (See chap. 33, p. 196, et seq.)

Allegation of Fraud.

Where relief is sought because of imposition or fraudulent devices, the fraud should be alleged in the statement of the case. It must distinctly state the particular act of fraud, misrepresentation, or concealment, and should specify how, when, and in what manner created. Such charges must be definite and reasonably certain, capable of proof, because they must be clearly proved. Kennedy v. Custer, 98 C. C. A. 584, 174 Fed. 981; Cella v. Brown, 75 C. C. A. 608, 144 Fed. 754;

Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Hammond v. Hopkins, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 577, 33 L. ed. 686, 10 Sup. Ct. Rep. 390; Braddock v. Louchheim, 87 Fed. 287; Field v. Hastings & B. Co. 65 Fed. 279; Lumley v. Wabash R. Co. 71 Fed. 21; Bangs v. Loveridge, 60 Fed. 966. And the charge would not of itself be sufficient unless injury shown. Linn v. Green, 5 McCrary, 380, 637, 17 Fed. 407. You cannot find fraud if allegations do not sustain the finding. Dashiel v. Grosvenor, 27 L. R. A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334.

Laches.

Often in the statement of a case in a bill it appears some length of time has elapsed between the accrual of the right and the filing of the bill, so that the bill would be demurrable because of *laches*. This is an equity which ordinarily stays the hand of a court of equity in granting the relief asked, though an equitable cause of action has been properly stated. Whenever delay in bringing the suit appears, you must, to properly state your case, anticipate this defense, and reasonably excuse the delay, such as the existence of some disability, or a fraudulent concealment of the facts by the defendant, or it must be shown that in the nature of things the cause of action or fraud perpetrated could not sooner have been discovered. There must be distinct averments when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been sooner made. Hubbard v. Manhattan Trust Co. 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 59; Hammond v. Hopkins, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; McIntire v. Pryor, 173 U. S. 57, 43 L. ed. 613, 19 Sup. Ct. Rep. 352; Root v. Woolworth, 150 U. S. 414, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136; McMonagle v. M'Glinn, 85 Fed. 92; Hardt v. Heidmeyer, 152 U. S. 560, 38 L. ed. 552, 14 Sup. Ct. Rep. 671; Whitney v. Fox, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713. See Ritchie v. Sayers, 100 Fed. 537.

Lastly, if in connection with the statement of the case it is

desired to have relief by injunction, *ne exeat*, or any other special order pending the suit, it shall be specially asked for, but the stating part of the bill must contain the necessary allegations upon which to base the special relief, and the relief must accord with the case thus made. Clause 5, rule 25.

I have thus pointed out in a general way the provisions of the stating part of a bill in equity. The stating part is the germ of the bill, for it is the plaintiff's case, and shows his title to relief. It should be positive and free from inference, looseness, and uncertainty of expression. The equity of your case must be shown there, for you cannot refer to other parts of the bill for it. If it omits material allegations you cannot supply them by proof (*Jackson v. Ashton*, 11 Pet. 249, 9 L. ed. 706), and its further importance is shown from the following facts:

First. That the defendant is not bound to answer any averments not contained in the stating part of the bill. Under new rule 30 the defense must set up an answer to each claim in the bill. *Coulston v. Franke Steel Range Co.* 221 Fed. 670.

Second. That any defense by motion, that was under the old rules presentable by plea in bar, the validity must be determined by the stating part of the bill.

Third. The stating part of the bill controls the prayer for relief. In a word, the stating part must be complete in itself, so that if admitted by the answer or proved by the evidence, the court can enter a decree disposing of the subject-matter.

CHAPTER XLVII.

THE PRAYER.

We now come to the prayer of the bill for relief and process. Prayer for relief must include both general and special relief. By new rule 25 a statement of and prayer for any special relief pending the suit or on final hearing must be set forth, and may be sought in the alternative. The prayer shall ask the special relief to which the complainant supposes himself entitled, and shall also contain a prayer for general relief out of abundant caution, as a general prayer for relief and sufficient facts *alleged* saves the bill from a general demurrer. *Walden v. Bodley*, 14 Pet. 164, 10 L. ed. 401; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 397, 35 L. ed. 1056, 12 Sup. Ct. Rep. 188; *Stevens v. Gladding*, 17 How. 455, 15 L. ed. 158; *Patrick v. Isenhardt*, 20 Fed. 339. And if any injunction or other auxiliary writ is required and justified by the stating part of the bill, it must be specially prayed for. *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 19.

The usual form is as follows:

"And plaintiff prays that upon final hearing of this cause that it be ordered and decreed (here insert special relief required) and for such other general relief as may to the court be deemed just and equitable."

As to a proper prayer for an accounting see *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 78.

The general prayer cannot broaden relief beyond the pleadings, and care should be taken to ask all relief in the special prayer. *First Nat. Bank v. Woodrum*, 86 Fed. 1005, 1006; *Texas v. Hardenburg* (*Texas v. White*), 10 Wall. 68-85, 19 L. ed. 839-841; *Savings & Loan Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 702, 703. While this is the general rule, yet, under the general prayer the court can grant the relief according to the case made. *Underground Electric R. Co. v. Owsley*,

169 Fed. 671; Tyler v. Savage, 143 U. S. 98, 36 L. ed. 90, 12 Sup. Ct. Rep. 340; Crawford v. Moore, 28 Fed. 824; English v. Foxall, 2 Pet. 612, 7 L. ed. 537; Swope v. Missouri Trust Co. 26 Tex. Civ. App. 133, 62 S. W. 950; Haggart v. Wilczinski, 74 C. C. A. 176, 143 Fed. 22-28; Patrick v. Isenhardt, 20 Fed. 339; Wilson v. Plutus Min. Co. 98 C. C. A. 189, 174 Fed. 320; Hayward v. McDonald, 113 C. C. A. 368, 192 Fed. 891.

Where you are not certain of your specific relief, it is permissible to frame your prayer in the alternative, such relief being consistent with the case made. Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 5, 6; Hubbard v. Urton, 67 Fed. 419; Hardin v. Boyd, 113 U. S. 763, 28 L. ed. 1143, 5 Sup. Ct. Rep. 771; Rigney v. DeGraw, 100 Fed. 213; McGraw v. Woods, 96 Fed. 56. New rule 25, clause 5. Thus in a suit to recover property procured by fraud, you may pray for the return or value. Hubbard v. Urton, 67 Fed. 425-426; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771. But a bill should not contain antagonistic prayers in the same cause of action. Cutter v. Iowa Water Co. 96 Fed. 777. But see Boyd v. New York & H. R. Co. 220 Fed. 174.

If an injunction is desired and your allegation will support it, you may add to the prayer for process a special prayer for the injunction, as follows:

"Complainant prays the court to grant him a writ of injunction enjoining and restraining the said C. D. defendant, his attorneys, agents and representatives, from (insert act or special matter to be enjoined), until the further order of this court."

Ne Exeat.

The new Code, sec. 261 (Comp. Stat. 1913, sec. 1238), embodying U. S. Rev. Stat. sec. 717, provide for issuing a writ *ne exeat regno*, as well as an injunction. Lewis v. Shainwald, 48 Fed. 492; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999. The writ of *ne exeat* is applied for if the defendant designs to quietly leave the United States, and there is a personal suit pending against him. It rests upon the allegation that his departure will produce a denial of justice and irreparable injury, or defeat the purpose of the suit. When proof

is made, the judge will grant the prayer and issue a writ forbidding the departure of the defendant unless he gives security to abide the decree. See *Mackenzie v. Barrett*, 73 C. C. A. 280, 141 Fed. 965, 5 A. & E. Ann. Cas. 551, and cases cited; also in *Re Appel*, 20 L.R.A.(N.S.) 76, 90 C. C. A. 172, 163 Fed. 1002. Old equity rule 23 has been abrogated, and if the writ is necessary, new Code, sec. 261, authorizes the issue. New rule 25, cl. 5, authorizes a statement of and prayer for any special relief, requiring in such case the bill to be verified.

If the relief is necessary pray as follows:

Wherefore complainant prays the court to grant him a writ of "*ne exeat*," forbidding and restraining the said C. D., defendant herein, from departing beyond the limits of the United States without leave of the court first had and obtained, etc. Rev. Stat. sec. 717; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Lewis v. Shainwald*, 48 Fed. 492.

Prayer for Process.

Under the old practice the prayer for process was carefully stated, Equity rule 7, being one of the component parts of the bill (*Goebel v. American R. Supply Co.* 55 Fed. 826; *Carlsbad v. Tibbetts*, 51 Fed. 852-855; *Armstrong Cork Co. v. Merchants' Refrigerating Co.* 171 Fed. 778; *United States v. Agler*, 62 Fed. 824); old equity rule 23 required a prayer for process of subpoena to contain the names of the defendants set forth in the introductory part of the bill, and if any of them are known to be infants, or otherwise under guardianship, the fact shall be stated, that the court may take order therein upon the return of the process. However, where both in the caption and body of the bill the defendants who were required to answer were named and plainly designated, the omission of the prayer for process was not demurrable. The strictness of the ancient rule has been relaxed in this country. *Jennes v. Landes*, 84 Fed. 73-74; *Buerk v. Imhaeuser*, 8 Fed. 457 (waived by appearance). Old equity rule 23 has now been abrogated, and it is now held that rules 25 and 30, being intended to secure brevity and simplicity in pleading, that a prayer for subpoena is not necessary, as it is the duty of the clerk under rule 12 to

issue it. So the prayer that the defendant be required to answer except under new rule 40, *Pittsburgh Water Heater Co. v. Beler Water Heater Co.* 222 Fed. 952.

Amendment of Prayer.

When the prayer is not consistent with the case made in the bill, it has been held that in some cases an amendment will be permitted at the hearing. *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Graffam v. Burgess*, 117 U. S. 194, 29 L. ed. 843, 6 Sup. Ct. Rep. 686; *Re Wellhouse*, 113 Fed. 962; *Pendery v. Carleton*, 30 C. C. A. 510, 59 U. S. App. 288, 87 Fed. 41; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 415, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188; See *Rigney v. De Graw*, 100 Fed. 213; *Bass v. Christian Feigenspan*, 82 Fed. 261. New rule 19 permits amendments of the pleadings or proceedings at any stage of the case if in furtherance of justice. (See Amendment of Bills.)

Signing Bills.

The bill must be signed by counsel, as it is considered an affirmation of good faith on his part, that there is ground for the suit in the manner which it is alleged and filed. Equity rule 24. The ancient rule of examining the bill by the chancellor before permitting it to be filed was in process of time discontinued, and it was left to the honor of the Bar that the bill would be framed without scandal or impertinence, and the relief is sought in good faith, which was evidenced by his signature. *Brinkley v. Louisville & N. R. Co.* 95 Fed. 349, 350; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 829, 830.

New rule 24 is substantially the same as old rule 24, cited above, with this addition, that the signature of counsel is a certificate that no scandalous matter has been inserted, and the pleading, whatever it may be, is not interposed for delay.

Verifying Bill.

It is not necessary, unless an injunction or some special order or process is asked, to preserve some right pending the suit, or when specially required by some rule of equity, as in old equity rule 94, now new rule 27, when a stockholder brings a bill against the corporation, or required by statute. *Hughes v. Northern P. R. Co.* 18 Fed. 110; see, also, *Black v. Henry G. Allen Co.* 9 L. R.A. 433, 42 Fed. 622. Nor need an amendment to the bill be verified. *Chase Electric Constr. Co. v. Columbia Constr. Co.* 136 Fed. 699. See new rule 25, clause 5.

Form of Verification.

State of }
 County of }

Personally appeared before the undersigned authority, A. B., the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill (or heard it read) and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

[SEAL]

Officer's signature.

CHAPTER XLVIII.

BILLS WITH DOUBLE ASPECT.

While under new rule 26 there may be a joinder in one bill of as many equitable causes of action as one may have against a defendant, or defendants, provided the liability is joint against all material defendants, yet the separate causes of action must be separately stated, and single in purpose. (See Joinder of Causes of Action and authorities cited.) It, however, becomes necessary sometimes to state a cause of action with a double aspect, or state an alternative case (*Shackleton v. Baggaley*, 95 C. C. A. 505, 170 Fed. 57; *Shields v. Barrow*, 17 How. 144, 15 L. ed. 162; *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550; *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 767; *McGraw v. Woods*, 96 Fed. 56; *Davis v. Berry*, 106 Fed. 761; *Halsey v. Goddard*, 86 Fed. 28; *American Box Mach. Co. v. Crosman*, 57 Fed. 1025; *Caldwell v. Firth*, 91 Fed. 177). As to recover specific property, or its value (*Hubbard v. Urton*, 67 Fed. 425; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771), or set aside fraudulent deed on two grounds (*Fisher v. Moog*, 39 Fed. 665). The double aspect is not objectionable, and it is largely discretionary with the court to permit it in the particular suit (*Chaffin v. Hull*, 39 Fed. 891), where there is no alternative prayer for inconsistent relief. Authorities above; *Shields v. Barrow*, *supra*; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 550, 551; *McGraw v. Woods*, *supra*; *Cutter v. Iowa Water Co.* 96 Fed. 777. Thus, there may be alternative grounds upon which a plaintiff may be entitled to an estate (*Halsey v. Goddard*, *supra*); such as where one claims as heir and devisee (*Stephens v. McCargo*, 9 Wheat. 502, 6 L. ed. 145; *DeForest v. Thompson*, 40 Fed. 381; *Chaffin v. Hull*, 39 Fed. 887); but the Federal court will not tolerate inconsistent grounds and prayers in the same bill (*Ritchie v.*

Sayers, 100 Fed. 520; *Cutter v. Iowa Water Co.* 96 Fed. 777; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607).

To illustrate: You cannot make a case that a party has a title, and has no title, and ask relief according to either condition. *Merriman v. Chicago & E. I. R. Co.* supra. You cannot ask that a certain agreement of compromise be set aside because induced by fraud, and have an alternative prayer for performance if not set aside. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 448. See *Hardin v. Boyd*, 113 U. S. 763, 28 L. ed. 1143, 5 Sup. Ct. Rep. 771; *McGraw v. Woods*, 96 Fed. 58. You cannot ask to set aside a release negligently executed by a trustee, and treat it as both void and valid. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* supra; *Williams v. Jackson*, 107 U. S. 484, 27 L. ed. 531, 2 Sup. Ct. Rep. 814; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 655, 656. Nor can you so treat a judgment. *Brooks v. Laurent and Cutter v. Iowa Water Co.* supra. You cannot file a bill to cancel a mortgage because the debt is illegal, and at the same time, if you are mistaken, you be allowed to redeem. *Merriman v. Chicago & E. I. R. Co.* supra; see *Rigney v. De Graw*, 100 Fed. 213.

If plaintiff is in doubt as to whether he is entitled to one kind of relief or another, he may frame a bill for relief in the alternative, and so pray, if the state of facts upon which the relief is prayed is not inconsistent. *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 742; *Ritchie v. Sayers*, 100 Fed. 536; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 5, 6, but either of the aspects must be set out distinctly in order to be cognizable in equity. *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 553.

Sometimes the bill may have a double sound, that is, may be interpreted in two ways; in such case the defendant may elect what construction to put on it, and as he treats it plaintiff will be bound. *American Box Mach. Co. v. Crosman*, 57 Fed. 1026; *Shields v. Barrow*, 17 How. 144, 15 L. ed. 162.

Such were the rulings under the old practice, but under the 5th clause of rule 25 it is provided that a statement of a prayer for special relief may be stated or sought in the "alternative." In *Boyd v. New York & H. R. Co.* 220 Fed. 178, it was stated that a lease was obnoxious to the Sherman act, S. Eq.—19.

and cancelation was asked for, and the preservation of stock depending on the lease sought to be annulled was asked in the same prayer. The inconsistency was not thought to be fatal under the clause of rule 25 above quoted.

CHAPTER XLIX.

DISCOVERY.

Having discussed the component parts of a bill now recognized as essential, I will briefly speak of bills of discovery. Their origin was found in a want of power in the common-law courts to compel a discovery of the truth, either through the oath of the party to the suit, or by any process of its own to compel the production of written evidence in the possession of an adverse party. *Colgate v. Compagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 84. This right to demand information only known to your antagonist in aid of your suit was permitted in equity on filing a bill for that purpose, known as bills of discovery. *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 301 and authorities cited; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 56-66; *Brown v. McDonald*, 68 L.R.A. 462, 67 C. C. A. 59, 133 Fed. 898. The ancient practice of seeking discovery was through interrogatories following the statement of your case, and this method was maintained until a comparatively recent period in the Federal courts.

In 1850 the Supreme Court, with a view of shortening the bill, promulgated equity rule 40, providing that it shall not be necessary to interrogate a defendant specially and particularly on any statement of the bill, unless the complainant desired to do so, and in case it was so desired a short form of interrogation was prescribed, cutting off much of the reiteration and prolixity that usually preceded interrogatories in the old forms. Old rule 43 gave the form to be used. *Tillinghast v. Chace*, 121 Fed. 436, and cases cited.

In 1864 Congress passed an act embodied in section 858 of the Revised Statutes of the United States, Comp. Stat. 1913, sec. 1464, providing that no witness should be excluded in any civil action because he is a party or interested in the issue

tried. This statute created a complete revolution in the common-law rules affecting the competency of parties as witnesses, and at once ended the necessity for a bill of discovery as auxiliary to a common-law suit. *Field v. Hastings & B. Co.* 65 Fed. 279.

In *United States v. McLaughlin*, 24 Fed. 825, the court said, that in view of this statute it is very doubtful if a pure bill of discovery will lie at this day, and no prudent counsel will file a bill purely for discovery, or call for discovery in a bill for relief. The court gives as a reason certain disadvantages arising from it, and quotes in support of his view *Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 1204, see, also, *Brown v. McDonald*, 130 Fed. 969, and cases cited; see *Safford v. Ensign Mfg. Co.* 56 C. C. A. 630, 120 Fed. 482; *Hudson v. Wood*, 119 Fed. 764; *United States v. Bitter Root Development Co.* 66 C. C. A. 652, 133 Fed. 280, and cases cited; *Preston v. Smith*, 26 Fed. 885; *Rindskopf v. Platto*, 29 Fed. 130.

In *Colgate v. Compagnie Francaise du Telegraphe*, supra, the court says the change made in the common-law rules of evidence, permitting a party to testify in his case, does not necessitate a court of equity foregoing the exercise of its ancient jurisdiction of discovery. See *Boyer v. Keller*, 113 Fed. 580.

In *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 26, the court thinks the right of discovery by bill in equity a valuable one, and when sought by interrogatories in the bill they must be answered. *Balfour v. San Joaquin Valley Bank*, 156 Fed. 500; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 176; *Gray v. Schneider*, 119 Fed. 474.

Old rules 40, 41, 42, 43, and 44, governing the issuing of interrogatories in aid of discovery in an equity cause, have in the last revision been embodied in new rule 58, the pertinent part to the present inquiry being as follows:

The plaintiff at any time after filing the bill, and not later than twenty-one days after joining issue, and the defendant at anytime after filing his answer, and not later than twenty-one days after joining issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties

of facts or documents material to the support or defense of the cause, with a note at the foot thereof stating the particular interrogatories each of the parties required to answer. *P. M. Co. v. Ajax Rail Anchor Co.* 216 Fed. 636, construing this rule, says either party has a right to require the other to answer questions relating to material matters; that is, as to the nature of the case and facts supporting it; but the rule cannot be used to discover the evidence of the opposite party. *F. Speidel Co. v. N. Barstow Co.* 232 Fed. 617; *Window Glass Mach. Co. v. Brookville Glass & Tile Co.* 229 Fed. 838.

Clause 2 of rule 58 provides for filing interrogatories to be answered by an officer of a corporation. Clause 3 requires copies of the interrogatories to be filed with the clerk, to be sent by him to the respective solicitors or the interrogated parties, or, if none, to the last known address of the opposite party. The interrogatories may be taken before any examiner or other officer authorized by new rule 52. Clause 4 requires the interrogatories to be answered and the answers to be filed within fifteen days after they have been served, unless the time is enlarged by the court or judge. Within ten days after the service of the interrogatories, objections to them or any of them may be presented to the court or judge with proof of notice of the purpose to do so and the answer shall be deferred until the objections are ruled upon. Clause 5, upon motion and reasonable notice the court may make such orders as may be necessary to force answers, or effect the production of books, documents, etc.,—for inspection—that may be material to the adversary's cause either for prosecution or defense. A party failing to obey such order may, if plaintiff, have his bill dismissed, if defendant, a judgment *pro confesso* may be taken. By the 6th clause, either party may on demand served ten days before the trial call on the other to admit in writing the execution of or genuineness of any document, letter, or other writing, and if such admission be not made within five days after such service the costs of proving the document shall be paid by the party refusing, unless at the trial the court should find the refusal reasonable.

It will be seen that the rule sets forth the conditions under which discovery may be asked, as well as the method of procedure when sought; but with or without a rule, a court of equity

has an original and inherent power to hear and grant an application by anyone having an equitable right or seeking an equitable remedy to enforce discovery when necessary to facilitate justice in any cause whether pending or anticipated. *Brown v. McDonald*, 68 L.R.A. 462, 67 C. C. A. 59, 133 Fed. 899; *Kurtz v. Brown*, 81 C. C. A. 498, 152 Fed. 373, 11 Ann. Cas. 576; *Brown v. Palmer*, 157 Fed. 797; *Brown v. Huey*, 166 Fed. 483; but if there be no equity in the bill discovery cannot be maintained. *First State Bank v. Spencer*, 135 C. C. A. 253, 219 Fed. 503. Again, by new rule 46 the testimony of witnesses is required to be taken orally in open court as in actions at law, so that if books, papers, documents, etc., are necessary to be produced in evidence, sec. 724 of the Revised Statutes of the United States (Comp. Stat. 1913, sec. 1469), confer authority on the courts upon motion to order their production, if they contain evidence pertinent to the issues, and to penalize the party refusing to obey the order.

In *Luten v. Camp*, 221 Fed. 424, construing rule 58, it is held (1st) that a waiver of an oath to an answer does not relieve the defendant from answering, as under the new rule the interrogatory is no longer a part of the bill as under the old rule; and (2d) that in issuing these interrogatories for discovery, the party may interrogate as to facts, but not the evidence tending to prove the facts. See also *Blast Furnace Appliances Co. v. Worth Bros. Co.* 221 Fed. 430.

CHAPTER L.

MULTIFARIOUSNESS AND MISJOINDER.

Under the old practice, multifariousness arose from a misjoinder of parties, or causes of action (*Animarium Co. v. Neiman*, 98 Fed. 15; *Schell v. Alston Mfg. Co.* 149 Fed. 440; *King v. Inlander*, 133 Fed. 416; *United States ex rel. Creek Nation v. Rea-Read Mill & Elevator Co.* 171 Fed. 515, and cases cited). Separate and distinct claims, or two or more *independent* causes of action against the same defendant in the same bill. *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 31-32, and cases cited; *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729. As before stated in discussing "Joinder of Causes of Action," we have seen that new rule 26 permits now the joinder of as many equitable causes of action as one may have against a single defendant. And if there be more than one plaintiff or one defendant such causes of action joined in one suit must be joint as to the plaintiffs, and as to the defendants the liability must be joint as to all the material defendants. *Or* sufficient grounds must appear for uniting causes of action in order to promote the convenience of justice. See "Joinder of Causes of Action" for further observation on this rule and authorities cited. It will be seen that the rule requires a joint interest in plaintiffs in the equitable causes of action joined in the suit, and a joint liability in the defendants joined, so that the bill would be still multifarious, if one plaintiff sued on more than one cause of action, and one action should be against a part of the defendants, and another cause of action against other defendants. See *Little v. Tanner*, 208 Fed. 608; *Emmons v. National Mut. Bldg. & L. Asso.* 68 C. C. A. 327, 135 Fed. 689; *State Trust Co. v. Kansas City, P. & G. R. Co.* 128 Fed. 129; *Hayden v. Thompson*, 67 Fed. 273; *Church v. Citizens' Street R. Co.* 78 Fed. 529; *United States v. Guglard*, 79 Fed. 24; *Eastern Bldg.*

& L. Asso. v. Denton, 13 C. C. A. 44, 31 U. S. App. 187, 65 Fed. 570; Farson v. Sioux City, 106 Fed. 278; Security Sav. & L. Asso. v. Buchanan, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 802; Leslie v. Leslie, 84 Fed. 70; Inman v. New York Interurban Water Co. 131 Fed. 997; Merriman v. Chicago & E. I. R. Co. 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 552; Crawford v. Washington Northern R. Co. 233 Fed. 962.

I do not think a joinder of such causes of action would fall within the rule, "that causes of action may be united when to join them would promote the convenient administration of justice." So, joining an action at law against one party and a suit in equity against another in same suit is multifarious. Thornton N. Motley Co. v. Detroit Steel & Spring Co. 130 Fed. 396; Walker v. Powers, 104 U. S. 250, 26 L. ed. 731; Coit v. Sullivan-Kelly Co. 84 Fed. 724. So, relying upon and seeking to avoid a decree is multifarious. Cutter v. Iowa Water Co. 96 Fed. 779; Cella v. Brown, 75 C. C. A. 608, 144 Fed. 742.

The rule has been treated as one of convenience, and used to prevent parties from being harassed and vexed in litigating matters in which they have no interest, and joining parties with no interests to be litigated, and, on the other hand, to protect the complainant from having to bring several suits when one will suffice. Animarium Co. v. Neiman, 98 Fed. 14; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 415, 32 L. ed. 471, 9 Sup. Ct. Rep. 127.

In Von Auw v. Chicago Toy & Fancy Goods Co. 69 Fed. 450, the court, quoting from Beach, Mod. Eq. Pr. says:

"To be multifarious, two or more causes of action must be joined against two or more defendants (Security Sav. & L. Asso. v. Buchanan, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 802; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 403-412, 32 L. ed. 468-470, 9 Sup. Ct. Rep. 127), when some of the defendants are concerned with some of the causes of action while others are not concerned with those which involve the former." New rule 26.

The other grounds stated in Von Auw v. Chicago Toy & Fancy Goods Co. *supra*, as a test of multifariousness, do not apply under the new rule.

Mr. Heard, in his Pleading with Precedents, lays down the

rule as follows: "Can the defendant say, I am called to answer a bill containing two distinct subject-matters, with one of which I am concerned, and there are other defendants not concerned with me in that matter." He illustrates by a bill brought against several infringers of patents, each infringer having no concern with the wrong done by others.

So, selling different lots of land out of the same tract to different individuals cannot be enforced by one bill against all the purchasers, nor can they unite in a bill to demand specific performance. *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402.

So, a bill setting up alleged liability of an assignee for unpaid stock to a corporation, and the liability of five others for colluding to defraud the creditors of the corporation, and a fraudulent sale of a railroad, is multifarious. *Holton v. Wallace*, 66 Fed. 409.

So, you cannot join an action against officers of a corporation for deceit, and against the corporation for dissolution and accounting. *Watson v. United States Sugar Refinery*, 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769; *Morse v. Bay State Gas Co.* 91 Fed. 944.

So, you cannot ask to enforce a trust in real estate and quiet title of one of the complainants in the property (*Leslie v. Leslie*, 84 Fed. 71; see *First Nat. Bank v. Peavey*, supra); but a trustee may set up a right in himself as well as trustee (*Metropolitan Trust Co. v. Columbus S. & H. R. Co.* 93 Fed. 689).

So, a suit by a stockholder, which seeks for himself to cancel stock and be relieved from the ownership, and in behalf of other stockholders to set aside fraudulent transfers of property, is multifarious. *Church v. Citizens' Street R. Co.* 78 Fed. 529; *Inman v. New York Interurban R. Co.* 131 Fed. 997.

So, where one gives to another two mortgages on separate lots, covering separate loans on each lot, and the lots have been conveyed to different persons, who are made defendants, the effort to foreclose both mortgages in one suit would be multifarious. *Eastern Bldg. & L. Asso. v. Denton*, 13 C. C. A. 44, 31 U. S. App. 187, 65 Fed. 569; see *Commercial Bank v. Sandford*, 99 Fed. 154.

So, antagonistic alternative prayers make the bill multifarious. *Cutter v. Iowa Water Co.* 96 Fed. 777; see *Halsey v. Goddard*, 86 Fed. 25. These cases in a measure illustrate the

rule that joining in one bill distinct and unconnected matters against one defendant or several matters of a distinct and independent nature against several defendants, so that the parties are liable respectively, and not as connected with each other, makes the bill multifarious. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127.

Then a bill to be free from this vice must relate to matters of the same nature having a connection with each other, and in which all of the defendants are more or less concerned. Thus, a cause of action against a corporation to foreclose, and one against stockholders to recover dividends because of wrongful distribution, would be multifarious if joined. *New Hampshire Sav. Bank v. Richey*, 58 C. C. A. 294, 121 Fed. 956; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Hayden v. Thompson*, 67 Fed. 273. For while courts of equity are averse to a multiplicity of suits, yet they will not permit parties and causes of action to be united in one suit, where the grounds of complaint are wholly distinct and unconnected and parties have no common interest in them. *Farson v. Sioux City*, 106 Fed. 278. While multifariousness must depend on the facts of each case, and therefore must necessarily depend on the discretion of the chancellor, yet the judicial discretion has been largely controlled by the case of *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 412, 32 L. ed. 470, 9 Sup. Ct. Rep. 127, wherein the following formula was stated:

First. The grounds of the suit must be different.

Second. Each ground must be sufficient as stated in the bill.

Third. It is not indispensable that all the parties should have an interest in all the matters contained in the suit, but will be sufficient if each party has an interest in some material matter in the suit and they are connected with the others. *Curran v. Campion*, 29 C. C. A. 26, 56 U. S. App. 383, 85 Fed. 70; *Tully v. Triangle Film Corp.* 229 Fed. 297.

It may be said, then, that no bill is multifarious that presents a common point of litigation and the decision of which will affect the whole subject-matter and settle the rights of all parties to the suit. *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 608; *Illinois C. R. Co. v. Caffrey*, 128 Fed.

770; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 64; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 26; *Pennsylvania Co. v. Bay*, 150 Fed. 770.

To illustrate: Two persons cannot unite distinct titles, although against the same person; but a party claiming through different titles the same property may unite the titles in the same bill. *Stephens v. McCargo*, 9 Wheat. 504, 6 L. ed. 146; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 32, 33, reviewing cases.

The rule may be further illustrated as follows:

A claim of a minority stockholder on his own behalf and in behalf of the corporation, founded on same facts, may be joined. *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 767. See *Ryan v. Seaboard & R. R. Co.* 89 Fed. 397.

So, a bill for specific performance of an agreement to deliver coal for money advanced, with alternative prayer for foreclosure of a mortgage securing the loan, would not be multifarious. *Peale v. Marian Coal Co.* 172 Fed. 639.

So, a bill by a judgment creditor to subject property fraudulently conveyed, because brought against different persons holding the property by different conveyances, is not multifarious. *Fowler v. Palmer*, 87 C. C. A. 157, 160 Fed. 1; *Hultberg v. Anderson*, 170 Fed. 657; *United States v. Allen*, 171 Fed. 907.

So, a bill to require an accounting is not multifarious because of different and separate transactions set out, even though as to some of them there was a remedy at law. *United Cigarette Mach. Co. v. Wright*, 132 Fed. 195; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 296.

So, where a bill is filed against several persons involving matters of the same nature, making up a series of acts intended to defraud the complainant, in which all the defendants were concerned, is not multifarious. *Horner-Gaylord Co. v. Miller*, 147 Fed. 295; *Field v. Western Life Indemnity Co.* 166 Fed. 607; *Sipe v. Columbia Ref. Co.* 171 Fed. 295.

So, a bill filed by a receiver against a number of directors to recover money lost through misconduct is not multifarious. *Allen v. Luke*, 141 Fed. 694; *Boyd v. Schneider*, 65 C. C. A. 209, 131 Fed. 223.

So, joining two or more complainants having separate interests, but dependent on the same issues, requiring the same evidence, and leading to the same decree, is not multifarious. *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 651; see *South Penn. Oil Co. v. Calf Creek Oil & Gas Co.* 140 Fed. 508; *Home Ins. Co. v. Virginia-Carolina Chemical Co.* 109 Fed. 682, S. C. 51 C. C. A. 21, 113 Fed. 5; *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160.

So, a bill to enjoin diverting waters would not be multifarious because portions of the water are claimed by different rights. *Rincon Water Co. v. Anaheim Union Water Co.* 115 Fed. 544; *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 327.

A bill is not multifarious because it seeks to enforce two series of bonds against a city, though to be paid for differently. *Burlington Sav. Bank v. Clinton*, 106 Fed. 270.

So, a bill to set aside a will and also a deed made by the same person, and alleged to have been procured by fraud of one of the defendants, would not be multifarious (*Williams v. Crabb*, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193), provided the rights of the other defendants will not be prejudiced thereby (*ibid.*). Nor where the bill alleges the infringement of two separate patents but both being processes having a single object. *United States Mineral Wool Co. v. Manville Covering Co.* 101 Fed. 145. See "Multifariousness in Patent Cases," *Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 989; *Chisholm v. Johnson*, 106 Fed. 191.

Again, it has been held that where a person has a number of separate claims against the same party, but all arising from a common cause governed by the same law and facts, a court will entertain the bill. This is permitted to avoid a multiplicity of suits, which is a distinct ground of equitable jurisdiction. *Watson v. National Life & T. Co.* 88 C. C. A. 380, 162 Fed. 7; *Illinois C. R. Co. v. Caffrey*, and *Liverpool & L. & G. Ins. Co. v. Clunie*, *supra*; *Sang Lung v. Jackson*, 85 Fed. 502; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contr. Co.* 57 Fed. 42; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 5; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 695. See *People's Nat. Bank*

v. Marye, 107 Fed. 570; Fitchett v. Blows, 20 C. C. A. 286, 36 U. S. App. 597, 74 Fed. 50.

So, to establish a lien and personal indebtedness. Ingersoll v. Coram, 127 Fed. 418.

The above chapter must be read in the light of rule 26.

How Multifariousness Should be Set Up.

Under new rule 29 an objection to nonjoinder of parties, or misjoinder of parties, or causes of action shall be made by motion to dismiss, or in the answer, which issue at the discretion of the court may be called up and disposed of *in limine*. The motion to dismiss may be set down for hearing by either party on 5 days' notice. Emmons v. National Mut. Bldg. & L. Asso. 68 C. C. A. 327, 135 Fed. 689; McCloskey v. Barr, 38 Fed. 166; Fitchett v. Blows, *supra*; Converse v. Michigan Dairy Co. 45 Fed. 18; Ranger v. Champion Cotton-Press Co. 52 Fed. 611; Barney v. Latham, 103 U. S. 215, 26 L. ed. 518; United States v. Agee, 47 C. C. A. 152, 108 Fed. 10; Tilden v. Barber, 227 Fed. 1010.

Form of Motion.

Title as in bill—Address as given before.

And now comes the defendant and moves to dismiss the bill filed in the above cause because it appears from said bill that the same is exhibited against this defendant and others (naming them) for several distinct matters and causes of action, in some of which, as appears by the bill, this defendant is in no way interested, that by thus joining the causes of action as therein contained, which are independent of each other, the proceedings will be unnecessarily intricate and prolix, and this defendant will be put to unnecessary costs in matters in which in no way relates to or concerns him.

Wherefore the defendant prays the judgment of the court whether he shall be compelled to answer further, and prays to be dismissed with his costs in this behalf incurred.

R. F.,
Solicitor, etc.

It further appears from new rule 26 that it is left to the discretion of the court to determine whether, in a joinder of causes of action in the same bill, they can be conveniently tried together, and if not, to order separate trials. This rule is applicable when a legal cause of action is joined with an

equitable cause of action. A defendant having a right of trial by jury if the cause be legal, the court under new rule 22 may transfer the legal action to the law side and retain jurisdiction of the equitable cause. *Cubbins v. Mississippi River Commission*, 204 Fed. 308; *Goldschmidt Thermit Co. v. Primos Chemical Co.* 216 Fed. 382. See *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 801, 802. But see act March 3, 1915 (see Dismissal by Court, p. 548). See *Curriden v. Middleton*, 232 U. S. 633, 58 L. ed. 765, 34 Sup. Ct. Rep. 458. See Act of Congress, p. 552 of Text.

CHAPTER LI.

EQUITY RULES AND MOTION DAYS.

We have now reached a point where the bill is prepared ready for filing, but before proceeding with the manner and effect of filing the bill, it is necessary to speak of the rules governing the preparation of a case in equity for final hearing in the Federal courts, and of the "motion days," and the purposes for which they are set apart.

From the time of filing the bill until the final hearing, every step taken is governed by rules established by the Supreme Court of the United States, as well as by the circuit and district courts; the rules established by the two last courts being only for convenience and entirely local in effect. The object and purpose of the rules thus promulgated is to speed and mature the cause for final hearing on its merits (*Allen v. New York*, 18 Blatchf. 239, 7 Fed. 483), and they must be followed (*Washington, A. & G. R. Co. v. Bradley* [*Washington, A. & G. R. Co. v. Washington*] 10 Wall. 307, 19 L. ed. 895; *Bank of United States v. White*, 8 Pet. 269, 8 L. ed. 941; *Gaines v. Relf*, 15 Pet. 9, 10 L. ed. 642), unless insistence upon them would cause great injustice. The authority to promulgate these rules is found in sec. 913 (Comp. Stat. 1913, sec. 1536), act of 1792, and sec. 917, act of 1842, of the United States Revised Statutes, which provides that the Supreme Court of the United States may from time to time prescribe, in any manner not inconsistent with any law of the United States, the forms of writs, etc. * * * and to regulate the whole practice to be used in suits in equity. *Steam Stone Cutter Co. v. Jones*, 21 Blatchf. 138, 13 Fed. 577; *Mahr v. Union P. R. Co.* 140 Fed. 925; *Deprez v. Thomson Houston Electric Co.* 66 Fed. 23.

By section 918, U. S. Rev. Stat. it is provided that the several circuit and district courts of the United States may, in a

manner not inconsistent with a law of the United States or with a rule of the Supreme Court, make rules and orders directing the return of writs and process, filing pleading, taking of rules, and otherwise regulate their own practice as may be convenient for the advancement of justice or prevention of delay in proceedings.

In accordance with the above provisions the Supreme Court in promulgating its rules in 1842 provided by equity rule 89 for the circuit and district judges concurring, to prescribe rules by them for their judicial districts not to be inconsistent with the rules prescribed by the Supreme Court.

By new rule 79 a majority of the circuit judges for the circuit, concurring with the district judge may make or amend any rule for the practice, proceeding, and process, mesne, and final in their respective districts, not inconsistent with the rules promulgated by the Supreme Court.

So, then, we have the equity practice in the Federal courts regulated:

First. By the laws of Congress.

Second. By the rules promulgated by the Supreme Court under the authority of Congress, now ninety-four in number.

Third. By such local rules in particular districts as have been promulgated by a majority of the circuit judges, as provided by new rule 79. Rev. Stat. sec. 913-918 (Comp. Stat. 1913, secs. 1536-1544); *Steam Stone Cutter Co. v. Jones*, supra; *Gaines v. New Orleans*, 27 Fed. 411; *Bein v. Heath*, 12 How. 178, 13 L. ed. 943; *Osborn v. Detroit*, 28 Fed. 385; *Allen v. New York*, supra; *Martindale v. Waas*, 3 McCrary, 637, 11 Fed. 551; *Northwestern Mut. L. Ins. Co. v. Keith*, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374-375.

The practice in equity, then, is regulated by the Federal judiciary, if not provided for by Congress, as experience develops necessity; and when rules are thus established, they have the full force of an act of Congress, if not in conflict with some previous law of Congress. *United States v. Barber Lumber Co.* 169 Fed. 186-187; *Northwestern Mut. L. Ins. Co. v. Keith*, supra; *Bryant Bros. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Bein v. Heath*, supra.

Old equity rule No. 90, providing that the practice of the circuit court in equity shall be regulated by the practice of

the high court of chancery in England, if a practice should arise not provided for by the rules, is now abrogated by the new rules promulgated by the Supreme Court of the United States to be effective February 1st, 1913. See new rule No. 81, applying the new rules to cases pending when they become effective, as well as to future cases, and abrogating all rules heretofore prescribed by the Supreme Court regulating the practice in suits in equity not contained or retained in the new rules. *North v. Herrick*, 203 Fed. 592.

How Time Prescribed by the Rules Must Be Computed.

Rule 80. When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday. The rule is self-explanatory.

So much, then, for the sources of authority and effect of the equity rules. See 210 U. S. beginning at page 508, for a history of the rules amendments.

District Court Always Open for Certain Purposes.

Rule 1. The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mean and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

New rule No. 1 embodies old rules Nos. 1 and 3. There is no material difference except in the fact that the notice required to be given of the application for orders not grantable of course may require the appearance of the other party to show cause to the contrary at any time according to the rules and practice of the court, and not on the next rule day as required in old rule No. 3, as rule days have been abolished by S. Eq.—20.

the new rules. New rule No. 1 is section 638 of the U. S. Rev. Stat.

Rule Days Abolished.

New Rule No. 2. The clerk's office shall be open during business hours on all days except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders, and other proceedings which are grantable of course.

We see, then, that the clerk's office is open every day, except the days specially excepted, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings applied for, *grantable of course*.

Orders Grantable of Course.

New equity rule No. 5 defines motions "grantable of course" as follows: All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees, for taking bills *pro confesso*, and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course, by the clerk; but the same may be suspended or altered, or rescinded by the judge upon special cause shown.

This rule is identical with old rule No. 5.

Orders Not Grantable of Course.

Old rule No. 3, now a part of new rule No. 1, as we have seen, provides that any district judge may, upon reasonable notice to the parties, make, direct, and award at chambers, or in the clerk's office, and in vacation as well as in term time, all such process, commissions, orders, rules, and other proceedings whenever the same are not grantable of course according to the rules and practice of the court. We see, then, that orders not grantable of course require an application to the court, reasonable notice to the opposite party, and to be heard at such time as may be fixed by the rules of the court, or at such time as the judge may assign.

New rule No. 6 requires the court to establish by rule "motion days" for the hearing of applications not grantable of course, and is as follows: Each district court shall establish regular times and places not less than one each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

Thus we see that applications for orders grantable of course may be made on any day except Sundays and legal holidays, to the clerk of the district court, but for orders "not grantable of course" application must be made to the court and reasonable notice given to the opposite party, to be heard upon "motion day" as fixed by the court, or such motion days as the court may establish for the hearing of applications not grantable of course, or upon such other days as the court may indicate.

CHAPTER LII.

FILING MOTIONS AND PRACTICE GOVERNING.

Old rule No. 3 has been abrogated, and new rule No. 3 substituted, which is as follows: The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances, shall be noted briefly and chronologically in this book on the folio assigned to the suit, and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their marking, all orders made or passed by him as of course, and also all orders made or passed by the judge in chambers. He shall also keep an "Equity Journal," in which shall be entered all orders, decrees, and proceedings of the court in equity and causes in term time. Separate and suitable indices of the equity docket, order book, and equity journal shall be kept by the clerk under the direction of the court.

It is thus seen that, instead of the order book, which under the old rule contained all motions, orders, and other proceedings in an equity suit made and directed on rule days or in chambers and grantable of course by the clerk or court with or without notice, and in which was preserved a complete history of the case, the clerk is now required to keep three books: first, an equity docket, in which each suit shall be entered with a file number corresponding to the folio of the book, and all papers and orders filed with the clerk in the suit; all process issued and returns thereon, and all appearances, shall be briefly noted and marked with its file number; second, the order book, in which all orders passed by the clerk as of course, and also all orders made or passed by the judge at chambers, shall be entered at length; third, an equity journal, in which shall be entered

all orders, decrees, and proceedings of the court in term time in the case; fourth, separate and suitable indices of all the books are to be kept by the clerk.

Entry as Notice.

New rule No. 4 abrogates old rule No. 4, which is as follows: Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties, or their solicitors; and when an order is made without prior notice to and in the absence of a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof by mail to such party or his solicitor, and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order.

An entry in the equity docket or order book is, as we see, not notice of itself under the new rule, and if an order is made without prior notice to or in the absence of a party the clerk must forthwith send a copy to such party or his solicitor, and the mailing of the order by the clerk as directed will be sufficient proof of due notice of the order. If a rule shall require notice of a proceeding to be given as in all proceedings and orders to be made by a judge in chambers when not grantable of course, as provided in rule No. 1, notice is essential to the solicitors or parties represented unless by any rule or practice of the court personal notice is required to be given to the parties. The time and manner of service is under the control of the court, as well as the time and place of the hearing, or it may be governed by local rules established by the court.

Orders in Chambers.

By new rule No. 1 any district judge may, on reasonable notice to the parties interested, make, direct, and award in chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings whenever the same are not *grantable of course* according to the rules and practice of the court. By new rule No. 6 each district court shall establish regular times and places,

not less than once each month, when motions requiring notice and hearing may be made and disposed of, but the judge may at any time and place and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of equitable causes. It is provided in this rule, however, that the senior circuit judge may dispense with the motion day in any district not to exceed two months in one year.

Motions.

Much of the preparation of any case in equity for final hearing rests upon motions to be made during its progress, and while heretofore it was considered that a motion to strike out portions of pleadings subject to a demurrer, or plea, was not good pleading in equity, yet the contrary has now been established by new rule No. 29, which abolishes pleas and demurrers, and provides that every defense heretofore made by pleas or demurrers must now be made by motion, which motion should request a dismissal of the bill, or the same defense can be set up by the answer. By new rule No. 21 exceptions to pleading for scandal and impertinence have been abolished, and a motion to strike out the objectionable matter must now be made to the judge. But whether the motion takes the place of the plea, demurrer, or exception, it should be drawn with some of the precision required of those abandoned methods of defense in order that the issue may be presented clearly, whether the motion be in abatement or in bar. It is provided in rule No. 29 that these motions may be separately heard before final hearing, at the discretion of the court, and the motion to dismiss the bill or any part thereof may be set down for hearing by either party on five days' notice, and if denied, the defendant shall have five days only within which to answer. All motions not thus specifically mentioned by rule, but which become necessary in developing the progress of the cause, would, it appears, be controlled by rule No. 6 when not *grantable of course*, and by rule No. 5 if *grantable of course*.

We have seen that much of the preparation of a case rests upon motions to be made during its progress, so I wish to briefly allude to these informal applications for some action,

or order of the court deemed necessary to facilitate a hearing of the case. They must state the parties in whose favor and against whom the relief is asked, and they should state accurately the particular relief required, with a prayer for the relief as stated. They are of two kinds, *ex parte* and *on notice*, and under which class your motion falls depends upon the rules of court, and the court's discretion. We see, then, that the motion may be set down for hearing either on the motion days established by the court as required under rule No. 6; or application can be made to hear the motion at any other time and place than the time and place fixed by the motion day, if reasonable notice has been given to the other party of the setting down of the day, or according to a rule in which a definite method has been provided.

Under the old rules motions were only appropriate in the absence of a remedy by regular pleadings (Illinois C. R. Co. v. Adams, 180 U. S. 29-38, 45 L. ed. 410-413, 21 Sup. Ct. Rep. 251; Virginia, T. & C. Steel & I. Co. v. Harris, 80 C. C. A. 658, 151 Fed. 435), but under the new rules they are used in lieu of pleas and demurrers, to settle important questions of law or fact, which dispose of the merits of the case. New rule 29.

If the judge be not present on the day and at the place appointed for hearing, then it must be postponed to some future day; and counsel should have notice of any change of time and place as to when and where the motion will be heard. In cities of a limited territory where a Federal judge may always be found, there is not much difficulty in getting a hearing at the time and place fixed by the rules or the court; but where a district covers a vast amount of territory, it is generally difficult and expensive to pursue the judge and get a hearing on these preliminary steps to a final hearing. The consequence is that the tediousness and delay in maturing a case for hearing under these conditions still exist.

CHAPTER LIII.

FILING THE BILL AND SERVING PROCESS.

By equity rule No. 1, the district courts of the United States are always open as courts of equity for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process; and making and directing all interlocutory orders and motions, rules, and other proceedings preparatory to the hearing of all causes pending therein on their merits. U. S. Rev. Stat. sec. 638. Under this rule you may file at any time in the clerk's office your bill, and you are entitled on filing the same to the process of subpoena.

By equity rule No. 7 the process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and unless otherwise provided in these rules, or specially ordered by the court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

The process of subpoena, then, requires the defendant to appear and answer the bill.

By equity rule No. 11, which is the same as old rules Nos. 11 and 12, it is provided that no process of subpoena shall issue from the clerk's office until the bill is filed in said office. By old rule No. 16 it was not until the return of the subpoena as served and executed upon the defendant that the clerk was allowed to docket the cause as a suit pending; but by the new rule No. 3 the clerk is required to keep an equity docket in which he shall enter each suit, with all process issued and returns thereon, and, it seems, whether served or not. So under this rule filing the bill is the beginning of the suit. See *Humane Bit Co. v. Barnet*, 117 Fed. 316, citing *Farmers'*

Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564; Armstrong Cork Co. v. Merchants' Refrigerating Co. 171 Fed. 778.

Subpœna.

The process of subpœna issues as a matter of course when the bill is filed in the clerk's office and not before upon the application of the plaintiff (equity rule 12). It shall contain the names of the parties, and be made returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day of service thereof. By the same rule 12, where there is more than one defendant, the plaintiff may at his election sue out a separate subpœna for each defendant, or order a joint subpœna for all the defendants. See U. S. Rev. Stat. secs. 911, 912, Comp. Stat. 1913, secs. 1534, 1535; Middleton Paper Co. v. Rock River Paper Co. 19 Fed. 252; Chamberlain v. Mensing, 47 Fed. 436; United States v. Turner, 50 Fed. 734; Leas v. Merriman, 132 Fed. 512, and cases cited; Jewett v. Garrett, 47 Fed. 627.

By equity rule 14 if the subpœna is returnable not served, the plaintiff is entitled to another until service is had.

Office of Subpœna.

We have seen by equity rule 7 that the subpœna is the proper mesne process in equity to appear and answer the exigency of the bill. Its sole office is to bring the defendant into court to give jurisdiction. Seattle L. S. & E. R. Co. v. Union Trust Co. 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 179; Wheeler v. Walton & W. Co. supra; Rodgers v. Pitt, 96 Fed. 673, 674; Wilmer v. Atlanta & R. Air-Line R. Co. 2 Woods, 409, Fed. Cas. No. 17,775. It has no extraterritorial effect, so if issued to be served out of the district it is a nullity, unless permitted by statute, as in sections 740, 741 and 742, of U. S. Rev. Stat. new Code, secs. 52-55, Comp. Stat. 1913, secs. 1034-1037, appendix, or in the act organizing the Federal district in which

the suit is brought. In all of the acts of organization of these districts the territorial extent of the process is generally stated. *United States v. American Lumber Co.* 80 Fed. 311, S. C. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; *United States ex rel. McIntosh v. Crawford*, 47 Fed. 561; *United States v. Stern*, 177 Fed. 479; *Hunter v. Russell*, 59 Fed. 966; *Kirk v. United States*, 124 Fed. 336; *Romaine v. Union Ins. Co.* 28 Fed. 625; *Galpin v. Page*, 18 Wall. 368, 21 L. ed. 963; *Treadwell v. Seymour*, 41 Fed. 580.

Sections 740, 741 and 742 have been before set forth, providing for service of process when there were several districts in one State and defendants in different districts, or when the action was local, or the land sued for lies in different districts. It was permitted in these cases to direct subpoenas to the United States marshals of the several districts in the same State. With these exceptions the subpoena cannot go beyond its district within which it is issued, and service in personal action can only be perfected upon the defendant *within* the district of the court's jurisdiction from whence the process issues. *Ableman v. Booth*, 21 How. 524, 16 L. ed. 176; *Toland v. Sprague*, 12 Pet. 328-330, 9 L. ed. 1104, 1105. If not thus served the court has no jurisdiction over the defendant unless he voluntarily appears. New Code, sec. 51, Comp. Stat. 1913, sec. 1033; *Hardenberg v. Ray*, 33 Fed. 814; *Jewett v. Garrett*, 47 Fed. 630.

Delivery to Marshal.

The subpoena, being thus prepared, must be delivered to the United States marshal of the district where issued. Legislation does not provide how it is to be delivered, further than to harmonize with the delivery of writs of that character in the State. U. S. Rev. Stat. sec. 911, Comp. Stat. 1913, sec. 1534. It is no doubt the policy of the law to keep the process of the court under the supervision and control of the court; it should therefore be delivered by the clerk to the United States marshal for service. See *Jewett v. Garrett*, 47 Fed. 625.

In the act reorganizing the districts of Texas, it was provided that when process was issued to defendants residing in several districts, that duplicate writs were to be indorsed by

plaintiff or his attorney that such duplicates were true copies of the process sued out of the proper district. This seems to contemplate that the process was to be delivered to the plaintiff or his attorney, to be sent to the marshals of other districts, but, as stated, this practice has not been pursued in Texas. See *ibid.*

Service of the Subpœna.

Jurisdiction is only required by service of subpœna or voluntary appearance. *Jewett v. Garrett*, 47 Fed. 630; *Re Grossmayer*, 177 U. S. 50, 44 L. ed. 666, 20 Sup. Ct. Rep. 535; *Caledonian Coal Co. v. Baker*, 196 U. S. 444, 49 L. ed. 545, 25 Sup. Ct. Rep. 375, and cases cited; *Kent v. Honsinger*, 167 Fed. 625.

By equity rule 15 it is provided that the service of all mesne and final process shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process must make affidavit thereof. U. S. Rev. Stat. sec. 787, Comp. Stat. 1913, sec. 1311, makes it the duty of United States marshals to serve throughout his district all lawful precepts directed to him and issued under the authority of the United States. See secs. 787, 789 and 790, Comp. Stat. 1913, secs. 1311–1314. Except when, as provided in section 922, Comp. Stat. 1913, sec. 1548, the marshal is a party to the suit, then the court must on application name a person to whom the process must be directed for service. But it is held in *Barnes v. Western U. Teleg. Co.* 120 Fed. 550, that if the deputy marshal serves the writ upon the marshal it is waived by appearance. See *Platt v. Manning*, 34 Fed. 817; *Jewett v. Garrett*, 47 Fed. 625.

Service; How Made.

The service of subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family. Equity rule 13; *King v. Davis*, 137 Fed. 206; *United States v. American Lun-*

ber Co. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 831; Phoenix Mut. L. Ins. Co. v. Wulf, 9 Biss. 285, 1 Fed. 775; Blythe v. Hinckley, 84 Fed. 228; Von Roy v. Blackman, 3 Woods, 98, Fed. Cas. No. 16,997. Usual place of abode meaning present residence, and not last place of abode. Earle v. McVeigh, 91 U. S. 508, 23 L. ed. 400; Swift v. Meyers, 37 Fed. 42; Blythe v. Hinckley, supra. The method thus provided for the service of process must be followed in equity. State statutes have no control. Kent v. Honsinger, supra; U. S. Rev. Stat. sec. 914, Comp. Stat. 1913, sec. 1537, has no application to equity. O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840. The service is governed by the judiciary acts and rule 13. Nickerson v. Warren City Tank & Boiler Co. 223 Fed. 843.

Service; Where Made.

The service must be made within the district, or it is void. Except as before stated, when authorized to be issued beyond the district in which the suit is brought, as in secs. 52, 54 and 55, new Judicial Code (Comp. Stat. 1913, secs. 1034-1037), appendix. See Nickerson v. Warren City Tank & Boiler Co. supra. See further to same effect, Waters v. Central Trust Co. 62 C. C. A. 45, 126 Fed. 471; Cely v. Griffin, 113 Fed. 981; Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093. It may be served on party while in transit through district (Jewett v. Garrett, 47 Fed. 625; Holyoke & S. H. F. Ice Co. v. Ambden, 21 L.R.A. 319, 55 Fed. 593), when suit filed in plaintiff's district as provided for in section 51, new Judicial Code; and if not made personally must be left with an adult person who is a member of the family, or residing with the family. Von Roy v. Blackman and Phoenix Mut. L. Ins. Co. v. Wulf, supra. If a person declines to receive the paper from the officer, he may deposit it in any convenient place in the presence of the party, and the service will be good. And the service of process may be made by the marshal after removal, or an expired term. U. S. Rev. Stat. sec. 790, Comp. Stat. 1913, sec. 1314.

Under old equity rule 13 service on the husband and wife was held good if only served on husband, but since the amended rule of 1874 it must be served on both. O'Hara v. MacCon-

nell, *supra*, but new equity rule 13 requires service on both separately.

Service on Attorney.

When the suit is auxiliary in its nature, as when brought to sustain an action at law or in cases of cross bills, service on attorneys who appeared for the parties in the action at law or in the original bill has been held to be valid, or then in such cases such substituted service is not allowed. *Shainwald v. Davids*, 69 Fed. 702, 703; *Cortes Co. v. Thaunhauser*, 20 Blatchf. 59, 9 Fed. 227; *Bowen v. Christian*, 16 Fed. 729. (See "Substituted Service.") So when suit is brought to obtain a new trial at law. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 633, 17 L. ed. 895; *Oglesby v. Attrill*, 14 Fed. 214.

Service on Agent.

Service on any agents or employees having charge or control of the inclosure of public lands of the United States will be sufficient when injunctions are sued out by the United States to restrain any violation of the laws of the United States in occupying said lands. Chap. 2, sec. 24, ¶ 21, New Code (Comp. Stat. 1913, sec. 991 (21)), effective January 1st, 1912.

When a State requires a corporation to appoint an agent in the State upon whom service can be made, the Federal courts will apply the law to service when necessary. *Nickerson v. Warren City Tank & Boiler Co.* 223 Fed. 844.

Service on Executor or Guardian.

Service on in official capacity is sufficient as personal service. *Cornell v. Green*, 37 C. C. A. 85, 95 Fed. 334.

Service on a State.

When process issues against a State, the subpoena should be served on the executive and attorney general. Rule 5. Process must be directed to the State. *Florida v. Georgia*, 11

How. 293, 13 L. ed. 702; Rhode Island v. Massachusetts, 7 Pet. 651, 8 L. ed. 816; New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741, s. c. 5 Pet. 289, 8 L. ed. 129.

Subpœna Cannot be Served When Defendant Privileged from Service.

A defendant may be privileged from service, though within the jurisdiction of the court issuing the service; and in such cases service, if made, can be quashed on motion. *Matthews v. Puffer*, 20 Blatchf. 233, 10 Fed. 606. Thus, a party enticed into the district for the purpose of serving him cannot be legally served with process. *Re Johnson*, 167 U. S. 126, 42 L. ed. 105, 17 Sup. Ct. Rep. 735; *Steiger v. Bonn*, 4 Fed. 17; *Cavanagh v. Manhattan Transit Co.* 133 Fed. 818; *Jewett v. Garrett*, 47 Fed. 631; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 105, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. Or when attending a judicial hearing as party or witness. *Brooks v. Farwell*, 1 McCrary, 132, 2 McCrary, 220, 4 Fed. 166; *Kinne v. Lant*, 68 Fed. 436; *Kauffman v. Kennedy*, 25 Fed. 785; *Morrow v. Dudley*, 144 Fed. 441; *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 19; *Jewett v. Garrett*, *supra*; *Plimpton v. Winslow*, 20 Blatchf. 82, 9 Fed. 365; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Hale v. Wharton*, 73 Fed. 741; but see *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co.* 132 Fed. 208, for exception. The privilege is limited to a reasonable time. *Miner v. Markham*, 28 Fed. 387. And it does not apply to one voluntarily coming within the jurisdiction of the court. *Brush Creek Coal & Min. Co. v. Morgan-Gardner Electric Co.* 136 Fed. 505; *Houston v. Filer & S. Co.* 85 Fed. 758; *Roschynialski v. Hale*, 201 Fed. 1017, and cases cited.

Service Before Return Day.

The writ is *functus officio* if not served before return day. *Edmonson v. Bloomshire*, 7 Wall. 310, 19 L. ed. 92. If served after return day, all proceedings thereafter, in the absence of appearance by defendant, are void. Equity rule 12; equity rule 14.

Effect of Valid Service.

The jurisdiction of the Federal courts attaches when service is perfected, and not on filing bill. *United States v. Miller*, 164 Fed. 444; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; *Owens v. Ohio C. R. Co.* 20 Fed. 10-12; *Rodgers v. Pitt*, 96 Fed. 668-673; *United States v. Eisenbeis*, 50 C. C. A. 179, 112 Fed. 196; *Wheeler v. Walton & W. Co.* 65 Fed. 722. And this applies when the issue arises between courts of concurrent jurisdiction as to which court first took jurisdiction. *Ibid.*; and *Pitt v. Rodgers*, 43 C. C. A. 600, 104 Fed. 389. (See "Conflict between State and Federal Courts.")

Return of Subpœna.

By equity rule 12 it is provided that the subpœna shall be returnable to the clerk's office twenty days from the issuing thereof.

U. S. Rev. Stat. sec. 660 provides that no process in any circuit court shall abate or be rendered invalid by reason of any act changing the time of holding the court, but the same shall be deemed returnable to the term next after the return day thereof. The return must be made by the marshal or deputy or by the court's appointee by affidavit (*Hill v. Gordon*, 45 Fed. 278; see *United States v. Gayle*, 45 Fed. 107); and it must show that the subpœna has been served in pursuance of the requirements of equity rule 13, as previously given.

When the service is not made by a delivery of a copy of the subpœna to the person named, but by leaving a copy at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family, the return must show that the provision of the statute was exactly pursued. *Von Roy v. Blackman*, 3 Woods, 98, Fed. Cas. No. 16,997. Thus, a return stating that a copy was delivered to an adult who was a resident of the place of abode was held insufficient. *Blythe v. Hinckley*, 84 Fed. 228; *Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444; *United States v. American Bell Teleph. Co.* 29 Fed. 32. Service may be made at door outside of dwelling, not necessarily "in the dwelling."

Phœnix Mut. L. Ins. Co. v. Wulf, 9 Biss. 285, 1 Fed. 775; Earle v. McVeigh, 91 U. S. 510, 23 L. ed. 401.

Defective spelling of a name in a return will not vitiate it, if it be *idem sonans*; but "Jacob Craig" and "Jacob Crug" would not be *idem sonans*. McClaskey v. Barr, 45 Fed. 151.

When service on executor, the service reciting served on A. B. as executor would be good individually, but not as executor. See Cornell v. Green, 37 C. C. A. 85, 95 Fed. 334.

A return by special deputy, not in name of the marshal, is only an irregularity. Hill v. Gordon, 45 Fed. 276.

The return of an officer touching any fact about which he was bound to make return is conclusive on the parties to the suit and their privies (Von Roy v. Blackman, *supra*), on collateral attack. United States v. Gayle, *supra*; see King v. Davis, 137 Fed. 217; Cohen v. Portland Lodge, No. 142, B. P. O. E. 140 Fed. 775; Frank Parmelee Co. v. Ætna L. Ins. Co. 92 C. C. A. 403, 166 Fed. 743; New River Mineral Co. v. Roanoke Coal & Coke Co. 49 C. C. A. 78, 110 Fed. 343. It is not conclusive as between strangers to the litigation. Rigney v. Delraw, 100 Fed. 213.

Motion to Quash.

If defect is apparent, it should be met by motion to quash; if not apparent, the issue should be made by motion. See U. S. Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591, providing for procedure in cases of defect of form in the summons or writ. Robinson v. National Stock-yard Co. 20 Blatchf. 513, 12 Fed. 361; Scott v. Stockholders Oil Co. 122 Fed. 835; United States v. American Bell Teleph. Co. 29 Fed. 17; Matthews v. Puffer, 20 Blatchf. 233, 10 Fed. 606; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398. However, the motion to quash being the much more expeditious way of settling the sufficiency of the services, the better method is to move to quash, setting up the facts that render the service bad, and supporting them by affidavits. Benton v. McIntosh, 96 Fed. 132; American Cereal Co. v. Eli Pettijohn Cereal Co. 70 Fed. 276; Wall v. Chesapeake & O. R. Co. *supra*; Higham v. Iowa State Travelers' Asso. 183 Fed. 847. See chap. 55, p. 331.

Extrinsic evidence to impeach return of marshal good on its

face will not be received where State law forbids it. *Trimble v. Erie Electric Motor Co.* 89 Fed. 51. All presumptions are in favor of the officer's return. *New River Mineral Co. v. Roanoke Coal & Coke Co.* 49 C. C. A. 78, 110 Fed. 344. And when attacked because not served in time, if the face of return shows it was served in time, it makes a prima facie case. *Ibid.* If motion overruled, you cannot set up facts in answer. *Foye v. Guardian Printing & Pub. Co.* 109 Fed. 368.

Amendment of Process.

You may amend the writ of summons if it varies from the complaint, U. S. Rev. Stat. secs. 911, 948, 954, Comp. Stat. 1913, secs. 1534, 1580, 1591, new rule 19; *King v. Davis*, 137 Fed. 209; *Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 616; *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. 285, 1 Fed. 775; *Norton v. Dover*, 14 Fed. 106; *Chamberlain v. Bittersohn*, 48 Fed. 40-42; *Semmes v. United States*, 91 U. S. 21, 23 L. ed. 193; *Gilbert v. South Carolina Interstate & W. I. Exposition Co.* 113 Fed. 524; *Gulf, C. & S. F. R. Co. v. James*, 1 C. C. A. 53, 4 U. S. App. 19, 48 Fed. 150. As, when the writ is returnable on the wrong day. *Norton v. Dover*, 14 Fed. 107. Or you may amend the return of service, and that power is freely exercised in the interest of justice,—especially when the amendment will not affect the rights of third parties. *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. 285, 1 Fed. 775, U. S. Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591, held to apply to equity procedure. See *Nickerson v. Warren City Tank & Boiler Co.* 223 Fed. 843; *Dancel v. United States Shoe Machinery Co.* 120 Fed. 839. You cannot, however, in case of removal from a State to a Federal court, amend the summons after removal. *Hawkins v. Peirce*, 79 Fed. 452; *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156.

When Not Allowed to Amend.

King v. Davis, 137 Fed. 209; *Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 614; *Frank v. Union Cent. L. Ins. Co.* 130 Fed. 225; *Brown v. Pond*, 5 Fed. 34; *United States v. Rose*, 14 Fed. 681; *Hawkins v. Peirce*, 79 Fed. 452.

CHAPTER LIV.

SERVICE OF PROCESS ON CORPORATIONS.

We have seen a State may impose any condition on a foreign corporation as precedent to doing business within her limits, provided the conditions are not repugnant to the Federal Constitution and laws, or principles of natural justice. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 42, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. 502. The State may therefore stipulate the manner and mode of service, and the person on whom, in the event of suit, service of the process can be made; and doing business in the state is considered an assent to the methods established. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Tex. Rev. Stat.* 1223; *Westinghouse Electric Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 205.

While service from a Federal court in equity is not controlled by State statutes, yet where there is no provision on the particular case indicated by Federal law, the requirements of the State statutes will be followed if deemed reasonable. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424-434, 49 L. ed. 1111-1116, 25 Sup. Ct. Rep. 740; *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 922; *Youmans v. Minnesota Title Ins. & T. Co.* 67 Fed. 284; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 195, 37 L. ed. 700, 13 Sup. Ct. Rep. 859; *McCord Lumber Co. v. Doyle*, 38 C. C. A. 34, 97 Fed. 22; *Dinzy v. Illinois C. R. Co.* 61 Fed. 53; *St. Clair v. Cox*, 106 U. S. 359, 27 L. ed. 226, 1 Sup. Ct. Rep. 354. But this rule must

be considered in connection with the limitation of the Federal law as to place of suit. See chap. 18. *Weller v. Pennsylvania R. Co.* 113 Fed. 502; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Re Keasby*, 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; *Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526. It may be stated as a rule that Federal courts in determining the sufficiency of service follow the laws of the state. *Ibid.*; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 919-922; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; *Illinois Steel Co. v. San Antonio & G. S. R. Co.* 67 Fed. 561; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 734, 735; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 202; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 40; *Collier v. Mutual Reserve Fund Life Asso.* 119 Fed. 619; *Devere v. Delaware, L. & W. R. Co.* 60 Fed. 886; *Revans v. Southern Missouri & A. R. Co.* 114 Fed. 982; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 305, 306, 34 L. ed. 965, 966, 11 Sup. Ct. Rep. 306. They are particularly exacting with reference to corporations. *Amy v. Watertown*, 130 U. S. 316, 317, 32 L. ed. 951, 952, 9 Sup. Ct. Rep. 530; *Lemon v. Imperial Window Glass Co.* 199 Fed. 928.

The State of Texas provides the following laws controlling service on corporations:

Batts's Rev. Stat. 1220, provides that in suits against a county the process shall be served on the county judge of such county. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Knox County v. Harsham*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257.

Batts's Rev. Stat. 1221, provides that in suits against an incorporated town, city, or village, the process may be served on the mayor, clerk, secretary, or treasurer. *Houston v. Emery*, 76 Tex. 282, 13 S. W. 264; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; *Stabler v. Alexandria*, 42 Fed. 490.

Batts's Rev. Stat. 1222, provides that in suits against any incorporated company or joint stock associations the citation may be served on the president, secretary, or treasurer of such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours; and in suits against receivers of railroad companies service may be had on the general division superintendent or receiver, or upon any agent of the receiver who resides in the county in which suit is brought. This act was amended in 1905, sec. 2 of said act providing for service on foreign corporations by permitting service on train conductors and ticket agents of railroads or agents authorized to contract for transportation.

Batts's Rev. Stat. 1223, provides that in suits against any *foreign* corporation, private or public, or any joint stock association or company, citation or other process may be served on the president, vice president, secretary, treasurer or general manager, or upon any local agent of any such corporation within the State. There have also been special provisions made for service of process in suits against life and health insurance companies. *Werner Stave Co. v. Smith* (Tex. Civ. App.) 120 S. W. 247; *Cameron v. W. M. Jones & B. Mach. Works*, 41 Tex. Civ. App. 4, 90 S. W. 1129-1134; *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Bay City Iron Works v. Reeves & Co.* 43 Tex. Civ. App. 254, 95 S. W. 739. The citation must be directed to the company. *Texas & M. R. Co. v. Wright* (Tex. Civ. App.) 29 S. W. 1134; *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 580, 16 S. W. 430; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 4. And the service must be within the State. *Louisville & N. R. Co. v. Emerson*, 43 Tex. Civ. App. 281, 94 S. W. 1105.

Batts's Rev. Stat. art. 3070, act 1885, provides that suits may be instituted and prosecuted against life and health insurance companies in any county where the loss occurred or where the policy holder instituting the suit resides, and process may be served on any person in this State holding a power of attorney from such company, and if no such person, then affidavit of the fact may be filed and process served by publication.

Batts's Rev. Stat. art. 3064, act 1874, required life and health insurance companies to file with the commissioner of insurance under their corporate seals, powers of attorney for all of their agents, officers, and representatives in the State, authorizing them to accept service of any civil process in behalf of such company, and such service was to be held and taken as valid and all claims of error by reason of such service was waived.

Batts's Rev. Stat. art. 3090, act 1889, provides that life or casualty insurance companies or associations, organized under any of the laws of the United States outside of Texas, shall appoint the commissioner of insurance to be its true and lawful attorney, upon whom all lawful process in action or proceeding against it may be served

I have thus grouped the Texas statutes providing for service on corporations, foreign or domestic, and the construction thereof, to be used as a standard of comparison with other States.

It was said above that Federal courts follow these laws in determining upon whom service is to be made, but this reservation must be added, that the party named by the State law must so far represent the company that he may be properly held an agent to receive such process in behalf of the corporation; on the theory that the relation of the person served to the company must be such as would secure knowledge of the process by the company. *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 741; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Strain v. Chicago Portrait Co.* 126 Fed. 832; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 195, 37 L. ed. 700, 13 Sup. Ct. Rep. 859; *Bay City Iron Works v. Reeves & Co.* 43 Tex. Civ. App. 254, 95 S. W. 739; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 919; *Hagstoz v. Mutual L. Ins. Co.* 179 Fed. 570; *Higham v. Iowa State Travelers' Asso.* 183 Fed. 847; *Simon v. Southern R. Co.* 115 C. C. A. 58, 195 Fed. 56; *Chin v. Foster-Milburn Co.* 195 Fed. 158; *Wylie Permanent Camping Co. v. Lynch*, 115 C. C. A. 288, 195 Fed. 386; *Premo Specialty Mfg. Co. v. Jersey-Creme Co.* 43 L.R.A.(N.S.) 1015, 118 C. C. A. 458, 200 Fed. 352.

The term "any agent," used in State laws, may not always be followed. Thus a mere employee in the office of a local

agent would not be sufficient, not holding any of the designated offices in the company. *Fearing v. Glenn*, 19 C. C. A. 388, 38 U. S. App. 424, 73 Fed. 116; *Western Cottage Piano & Organ Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516. So, service on a passenger agent whose duty was only to solicit passage (*Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *William Grace Co. v. Henry Martin Brick Co.* 98 C. C. A. 167, 174 Fed. 131; *Weller v. Pennsylvania R. Co.* 113 Fed. 506; *Green v. Chicago, B. & Q. R. Co.* 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.* 98 C. C. A. 167, 174 Fed. 132; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421), or to solicit business, without power to make contracts (*Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398), would not bind the corporation; but service on an agent of a foreign railroad company, who solicits business, both freight and passenger, the foreign corporation leasing lines of railway in the State, and the agent being the general manager in the State, was held good. *Norton v. Atchison, T. & S. F. R. Co.* 61 Fed. 618; *Christie v. Davis Coal & Coke Co.* 92 Fed. 4.

So service on a station agent, if permitted by statute, is sufficient to bring a foreign corporation into court. *Dinzy v. Illinois C. R. Co.* 61 Fed. 49.

Service on a ticket agent at union depot office was held good. *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573. But if service is required by law to be made on the "regular" ticket agent, it must be so made. *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156. Service on an officer temporarily in the State was held not good. *Wilkins v. Queen City Sav. Bank & T. Co.* 154 Fed. 173; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. Nor service on a traveling salesman. *McCall Co. v. Deuchler*, 98 C. C. A. 169, 174 Fed. 133. See *Michigan Aluminum Co. v. Aluminum Casting Co.* 190 Fed. 880.

As to effect of service on a joint agent of corporations, see *Mexican C. R. Co. v. Pinkney*, 149 U. S. 202, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.* 98 C. C. A. 167, 174 Fed. 132.

As to service on a general agent, see *Re Hohorst*, 150 U. S.

663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221; *Christie v. Davis Coal & Coke Co.* 92 Fed. 4; *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. 531; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; *Gottschalk Co. v. Distilling & Cattle Feeding Co.* 50 Fed. 681; *Henrietta Min. & Mill. Co. v. Johnson*, 173 U. S. 221, 43 L. ed. 675, 19 Sup. Ct. Rep. 402. Or on a managing agent, see *United States v. American Bell Teleph. Co.* 29 Fed. 18. A "managing agent" is defined in *Atlas Glass Co. v. Ball Bros. Glass Mfg. Co.* 87 Fed. 418; *St. Clair v. Cox*, 106 U. S. 357, 27 L. ed. 225, 1 Sup. Ct. Rep. 354; *Houston v. Filver & S. Co.* 85 Fed. 757; *Denver & R. G. R. Co. v. Roller*, *supra*; *Union Associated Press Co. v. Times-Star Co.* 84 Fed. 419; *Michigan Aluminum Co. v. Aluminum Casting Co.* 190 Fed. 880; *Swarts v. Christie Grain & Stock Co.* 166 Fed. 339.

If the State statute provides that it may be served on certain persons, if the officers are not found in the county, then the return must show in the Federal court that the officers could not be found in the *district*, if served upon persons named in the statute. *Miller v. Norfolk & W. R. Co.* 41 Fed. 431; *Amy v. Watertown*, 130 U. S. 316, 317, 32 L. ed. 951, 952, 9 Sup. Ct. Rep. 530; *Collins v. American Spirit Mfg. Co.* 96 Fed. 133; *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156.

Doing Business.

We have thus seen who may be served to bring a foreign or domestic corporation into a Federal court; but there is another consideration, in case of foreign corporations, to which your attention must be called, before service on the parties named can bind the foreign corporation, so as to bring it within the jurisdiction of a Federal court in a State other than the State of its incorporation.

The general rule is that legal service of process issuing from the Federal courts can only be had on a foreign corporation in the State of its incorporation, when it is *doing business* in the State where sued and in the Federal district of which plaintiff is a resident citizen, and this must be shown somewhere in the record. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Jackson v. Delaware River Amusement Co.* 131

Fed. 134; Swann v. Mutual Reserve Fund Life Asso. 100 Fed. 922; Earle v. Chesapeake & O. R. Co. 127 Fed. 237; Tierney v. Helvetia Swiss F. Ins. Co. 163 Fed. 83; Westinghouse Mach. Co. v. Press Pub. Co. 110 Fed. 254; Conley v. Mathieson Alkali Works, 110 Fed. 730; Eldred v. American Palace Car Co. 45 C. C. A. 1, 105 Fed. 455; Goldey v. Morning News, supra; Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 463, 464; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Buffalo Glass Co. v. Manufacturers' Glass Co. 142 Fed. 273; Cody Motors Co. v. Warren Motor Car Co. 196 Fed. 254; L. G. McKnight & Son Co. v. Cramer Furniture Co. 110 C. C. A. 612, 189 Fed. 48.

And the business must warrant the inference that the corporation is there present through its agent. Green v. Chicago, B. & Q. R. Co. supra; Norton v. W. H. Thomas & Sons Co. — Tex. Civ. App. —, 93 S. W. 711. That is, plaintiff may only sue a foreign corporation in his own residence district, if it is doing business there, and only on those conditions can valid service be made on the persons named to bind the corporation. Ibid.

I have already discussed what is meant by the words "doing business," to which reference is made, and a foreign corporation to obtain valid service upon it must (chap. 19)—

First. Be *doing business* in the State and district where sued; Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 464, which is a question of general, not local law. Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; West v. Cincinnati, N. O. & T. P. R. Co. 170 Fed. 349; Wange v. Public Service R. Co. 159 Fed. 190; Michigan Aluminum Foundry Co. v. Aluminum Castings Co. 190 Fed. 879.

Second. It must be the State and district where the plaintiff resides. Ibid.

Third. The service must be on some agent or officer representing it there.

Fourth. Must be local law making it amenable to suit there as a precedent to doing business. Mecke v. Valley Town Mineral Co. 89 Fed. 114; United States v. American Bell Teleph. Co. 21 Fed. 17.

So, when business ceases, the right to serve ceases. De-

Castro v. Compagnie Française du Telegraphe, 76 Fed. 426; Friedman v. Empire L. Ins. Co. 101 Fed. 535; Forrest v. Pittsburgh Bridge Co. 53 C. C. A. 577, 116 Fed. 357.

So, when a license is revoked, the right to service ceases. Swann v. Mutual Reserve Fund Life Asso. *supra*.

However, a withdrawal from the State would not have that effect as long as outstanding business remains upon which money is collected or paid. Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 610, 43 L. ed. 571, 19 Sup. Ct. Rep. 308. If not doing business, the officers temporarily or casually in a State cannot be served. Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co. 141 Fed. 211; Honeyman v. Colorado Fuel & I. Co. 133 Fed. 96; Johnson v. Computing Scale Co. 139 Fed. 339; Eirich v. Donnelly Contracting Co. 104 Fed. 1; Mecke v. Valletown Mineral Co. 35 C. C. A. 151, 93 Fed. 697; United States Graphite Co. v. Pacific Graphite Co. 68 Fed. 442; Rust v. United Waterworks Co. 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 137; Goldey v. Morning News, 156 U. S. 522, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; Barrow S. S. Co. v. Kane, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 99, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. But when doing business, then service on a resident director of a foreign corporation is good (Meyer v. Pennsylvania Lumbermen's Mut. F. Ins. Co. 108 Fed. 170); or service on the head of a firm, agent of a foreign corporation, is good (Re Hohorst, 150 U. S. 663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221); or service on persons named by State statutes: but either the return or the record must show that at the time of service the corporation was doing business in the State and district where served. Central Grain & Stock Exchange v. Board of Trade, 60 C. C. A. 299, 125 Fed. 463, 464, and authorities cited.

CHAPTER LV.

APPEARANCE.

By new rule No. 16, after service has been made and the writ returned, it shall be the duty of the defendant, unless the time shall be otherwise enlarged for cause shown, to file his answer or other defense to the bill within twenty days from the time of issuing thereof, as provided by rule No. 12; in default thereof, *pro confesso* may be taken and entered. Entering an appearance otherwise than by answer or other defense to the bill is now abolished, old rule No. 17 being abrogated. So any character of defense to the bill in point of law, whether it be misjoinder, or nonjoinder, or insufficiency of fact arising on the face of the bill, or any other defense that may have been made by plea or demurrer, is an appearance in the cause. The distinction between general and special appearances no longer obtains, and the technical rules of waiver, except as will be hereinafter stated, arising from the character of the appearance, are now submerged in the effort to expedite the cause. If you wish to object to some defect in the subpoena when tested by the statute; or some irregularity of service, or to deny any service; or some irregularity or insufficiency in the return of the subpoena; or that you were not amenable to service; or if you desire to claim the privilege of being sued in your own district, you must do so within the time required by rule No. 12, and by motion raising the objection. These are privileges, however, which may be waived by filing a defense to the bill, as a defense to its sufficiency or merit would be equivalent to such an appearance as would waive these irregularities and privileges, which must be specially claimed *in limine*. *Barnes v. Western U. Teleg. Co.* 120 Fed. 550; *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Ellsworth Trust Co. v. Parramore*, 48 C. C. A. 132, 108 Fed. 906. See also *Creighton*

v. Kerr, 20 Wall. 12, 22 L. ed. 310; Whitecomb v. Hooper, 27 C. C. A. 19, 53 U. S. App. 410, 81 Fed. 946; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Crawford v. Foster, 28 C. C. A. 576, 56 U. S. App. 231, 84 Fed. 939; Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69.

Of course if objection has been made by "motion to quash" because of the irregularities of process, or to the district of suit, and overruled before filing some character of defense to the bill, and exception to the ruling taken, then the filing of the defense does not waive so as to prevent a review of the ruling. Donahue v. Calumet Fire Clay Co. 94 Fed. 27 and cases cited. Baumgardner v. Bono Fertilizer Co. 58 Fed. 4; Standley v. Roberts, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 844. So a removal of the cause from a State to a Federal court, after a motion to quash as above stated has been filed, would not waive action of the Federal court on the motion. See Morris v. Graham, 51 Fed. 53; Southern P. Co. v. Denton, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44.

Proper Practice in Such Cases.

A motion to quash, supported by affidavit if the objection is not apparent, is the proper practice. Romaine v. Union Ins. Co. 28 Fed. 627; Robinson v. National Stock-Yard Co. 20 Blatchf. 513, 12 Fed. 361; Bostwick v. American Finance Co. 43 Fed. 897; Benton v. McIntosh, 96 Fed. 132; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398; Forrest v. Pittsburgh Bridge Co. 53 C. C. A. 577, 116 Fed. 358; American Cereal Co. v. Eli Pettijohn Cereal Co. 70 Fed. 276. (See "motion to quash," chap. 53, p. 320.

The motion to quash the writ or service may be as follows:

Title as in bill.

And now comes the defendant A. B. by his solicitor (or by himself) and moves the court to quash the writ of subpoena (or service or whatever the cause) issued herein, so far as the same relates to the defendant (naming him or myself) because said subpoena is invalid (or service defective, or return untrue, or served out of his district, but whatever the ground state specifically and then proceed), and for the reasons set forth above to vacate and hold the same for naught; and defendant prays the judgment of this court whether he shall be compelled to appear herein or answer thereto

because of the many defects in the process and return as above set forth by reason of which no legal service has been had, nor has defendant accepted service herein, nor has he (or they) voluntarily appeared, nor has he (or they) waived due service of process upon him (or them).

United States v. American Bell Teleph. Co. 29 Fed. 17-28.

The motion to quash the writ or service, whatever the cause, should go no further than raising the special objection to the form of the writ, or the irregularity of the service, for any affirmative matter raising an issue on the merits would waive the irregularity of service. Bankers' Surety Co. v. Holly, 134 C. C. A. 536, 219 Fed. 101, and cases cited; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Crawford v. Foster, 28 C. C. A. 576, 56 U. S. App. 231, 84 Fed. 939; Jones v. Andrews, 10 Wall. 332, 333, 19 L. ed. 936; Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69. You will find that the Federal courts have been liberal in permitting the defendant to attack irregularities of service, or want of jurisdiction (*Romaine v. Union Ins. Co.* 28 Fed. 626-636; *Harkness v. Hyde*, 98 U. S. 479, 25 L. ed. 238; *Lung Chung v. Northern P. R. Co.* 19 Fed. 256; *Forrest v. Union P. R. Co.* 47 Fed. 2); and it seems that the fact the defendant accepted service outside of his district would not prevent him from appearing and moving to dismiss, because not brought in his district (*Butterworth v. Hill*, 114 U. S. 133, 29 L. ed. 120, 5 Sup. Ct. Rep. 796; *United States v. Loughrey*, 43 Fed. 449; *Graham v. Spencer*, 14 Fed. 605, 606).

If the invalidity, irregularity, or defects claimed in the motion are apparent, the court will act at once, but if issues of fact are involved in the motion, and not admitted, then the motion should be supported by affidavits to which plaintiff may reply, which issue the court can set for hearing and hear in such manner as he may deem proper to expedite the cause, under rules 1 and 6. Where the objection to the service was that the party served was not the agent, or the party as alleged in the return, see *Missouri, K. & T. R. Co. v. Goodrich*, 129 C. C. A. 599, 213 Fed. 339; *American Cereal Co. v. Eli Pettijohn Cereal Co.* 70 Fed. 276; *United States v. American Bell Teleph. Co.* 29 Fed. 18; *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212,

54 Fed. 421; Jackson v. Delaware River Amusement Co. 131 Fed. 134; Collins v. American Spirit Mfg. Co. 96 Fed. 133.

A petition to remove does not waive objections to the service. Clews v. Woodstock Ins. Co. 44 Fed. 31; Morris v. Graham, 51 Fed. 53; Southern P. Co. v. Denton, 146 U. S. 206, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Goldey v. Morning News, 156 U. S. 522, 523, 39 L. ed. 518, 519, 15 Sup. Ct. Rep. 559; Reifsnider v. American Imp. Pub. Co. 45 Fed. 433; Wabash Western R. Co. v. Brow, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126; Kinne v. Lant, 68 Fed. 436; Donahue v. Calumet Fire Clay Co. 94 Fed. 26; Collins v. American Spirit Mfg. Co. 96 Fed. 133; Mecke v. Valley Town Mineral Co. 89 Fed. 114; Sharkey v. Indiana D. & W. R. Co. 186 U. S. 479, 46 L. ed. 1266, 22 Sup. Ct. Rep. 941.

When Defendant Not Sued in His District.

When the subpœna and service are regular, but the defendant is sued out of his residence district, and he wishes to claim his privilege to be sued in his own district (new judicial Code, sec. 51, Comp. Stat. 1913, sec. 1033), or the division of the district in which he resides (new judicial Code, sec. 53), you may use the following form of motion:

Title as in bill; commencement as above, and proceed:

Says he is not a citizen or inhabitant of, nor does he reside in, the..... district of....., but that he is an inhabitant of and resides in the county of....., which is in the.....district of....., which said district has jurisdiction of this defendant and not the.....district in which this suit is brought (deny acceptance of service, or waiver of it, or voluntary appearance as in above form). Wherefore defendant C. D. pleads his exemption to be used in this Federal district and says he is only subject to the jurisdiction of the Circuit Court of the United States for theDistrict of....., and prays to be dismissed hence with his reasonable costs in this behalf incurred.

R. F.,
Solicitor, etc.

See Romaine v. Union Ins. Co. 28 Fed. 626; Ellsworth Trust Co. v. Parramore, 48 C. C. A. 132, 108 Fed. 906; Butterworth v. Hill, 114 U. S. 133, 29 L. ed. 120, 5 Sup. Ct. Rep. 796; United States v. Loughrey, 43 Fed. 449; Graham v. Spencer, 14 Fed. 605-606.

While we have seen that an answer, or other defense filed under rules 12 and 16, which raises either a point of law or question of fact going to the merits of the case and setting up matter in bar of the suit waives irregularity of process, or the privilege of venue, or any matter purely in abatement. *Fosha v. Western U. Teleg. Co.* 114 Fed. 702; *Callahan v. Hicks*, 90 Fed. 539; *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 822; *Beamer v. Werner*, 86 C. C. A. 289, 159 Fed. 101; *L'Engle v. Gates*, 74 Fed. 515; *Scott v. Hoover*, 99 Fed. 250; *Whitecomb v. Hooper*, 27 C. C. A. 19, 53 U. S. App. 410, 81 Fed. 946; *Creighton v. Kerr*, 20 Wall. 8-12, 22 L. ed. 309, 310; *Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 187; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 809; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982. Yet it does not waive matters touching the fundamental jurisdiction of the court, as want of diversity of citizenship, or the absence of a Federal question, or the insufficiency of amount, as these defects can be raised at any time during the progress of the cause. They go to the power of the court, whereas the matters waived by answer to the merits or exercised by consent are but the means whereby the power is exercised. *Ibid.*; *Lackett v. Rumbaugh*, 45 Fed. 31; *Fales v. Chicago, M. & St. P. R. Co.* 32 Fed. 673; *Rodgers v. Pitt*, 96 Fed. 676; *Re Stutsman County*, 88 Fed. 341, 342; *Duncan v. Associated Press*, 81 Fed. 417; *Central Trust Co. v. Virginia, T. & C. Steel & I. Co.* 55 Fed. 769; *McBride v. Grand de Tour Plow Co.* 40 Fed. 162; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477, 478.

Sometimes an answer which would waive venue or irregularities in the subpoena or service may be entered without authority; in which event the defendant may appear showing a want of authority to waive venue, etc., and set up the objection to the process or venue. *Shelton v. Tiffin*, 6 How. 163, 12 L. ed. 387; *Graham v. Spencer*, 14 Fed. 603; *Jenkins v. York Cliffs Implement Co.* 110 Fed. 807.

Again, an answer to the merit may be withdrawn (*Creighton v. Kerr*, 20 Wall. 8-13, 22 L. ed. 309-311); but a withdrawal without leave of court, or by leave and "without prejudice to

plaintiff," leaves the record in a condition to take judgment by default for want of appearance (Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 606, 43 L. ed. 1104, 19 Sup. Ct. Rep. 761; First Nat. Bank v. Cunningham, 48 Fed. 517); or the court may proceed as if the defendant was still in its presence (Graham v. Spencer, 14 Fed. 607).

Substituted Service.

There is a service of process known as substituted service, which will be discussed under "Auxiliary Proceedings."

CHAPTER LVI.

SECTION 8, ACT 1875, AND PRACTICE THEREUNDER.

What has been said about process has referred to the process of subpœna and its limited scope within the district of suit, and those cases where it could reach beyond to other districts in the same State. *Cely v. Griffin*, 113 Fed. 981. I now propose to discuss section 8 of the act of March 3, 1875 (Comp. Stat. 1913, sec. 1039).

This section was passed in 1872 (U. S. Rev. Stat.) but was enlarged in 1875 and specially retained in the act of 1888 by section 5 of that act. *American F. L. M. Co. v. Benson*, 33 Fed. 456. The act did not enlarge the jurisdiction of the court, but gave greater scope to its process, and was of great importance, as it gave, for the first time in the history of the Federal system, the power and authority to reach nonresidents claiming an interest or right in and to property within the jurisdiction of the court. Special process was provided by this section to be sent beyond the limits of the State, and to require nonresidents to appear and answer. *Goddard v. Mailler*, 80 Fed. 423; *United States v. American Lumber Co.* 80 Fed. 313. I have heretofore alluded to this act in its relation to venue of suits, but I will now discuss it as an additional process, and give forms for its use. The act is as follows: Sec. 57, new Code (Comp. Stat. 1913, sec. 1039).

“When in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance, or lien, or cloud upon the title to real or personal property within the district where the suit is brought, one or more of the defendants shall not be an inhabitant of or found within the district, or shall not voluntarily appear thereto; it shall be lawful for the court to make an *order*, directing such defendants to appear, plead, answer, or demur, by a day certain, to be designated, which order shall be served on such absent defendants if practicable, wherever found, and also on the person or persons in possession or charge of

said property, if any there be; or, when such personal service is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six successive weeks, and in case such absent defendant shall not appear and plead, answer, or demur within the time limited or within such further time as may be allowed by the court in its discretion, and on proof of the service or publication of such order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of said suit in the same manner as if the absent defendants had been served with process in the said district, but such adjudication shall as regards such absent defendant without appearance affect only the property which shall have been subject to the suit and under the jurisdiction of the court therein within such district, and when a part of such property shall be within another district of the same State, the suit may be brought in either district. Provided that the defendant or defendants not personally notified may, upon entering his appearance within one year from the judgment, obtain an order setting aside the judgment and permitting him to defend on the payment of costs." U. S. Rev. Stat. sec. 738.

The special retention of this act in the act of 1888 was congressional recognition of the right of service personally or by publication, where title, claim, or encumbrance in, to, and upon property located in the district of suit was involved (*Morris v. Graham*, 51 Fed. 56, 57), and whether the suit be in law or equity. *Shainwald v. Lewis*, 6 Sawy. 585, 5 Fed. 517; *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 158; *Merrihew v. Fort*, 98 Fed. 899; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 515. A strict compliance with its provisions is exacted by the courts. *Jennings v. Johnson*, 78 C. C. A. 329, 148 Fed. 337; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; *Batt v. Procter*, 45 Fed. 515; *Gage v. Riverside Trust Co.* 156 Fed. 1002; *Jones v. Gould*, 141 Fed. 698; *Bracken v. Union P. R. Co.* 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 447. The notice must be one authorized by law, or it is void. *United States v. American Lumber Co.* 80 Fed. 313; *Kent v. Honsinger*, 167 Fed. 627. See *Blake v. Foreman Bros. Bkg. Co.* 218 Fed. 264.

See sec. 57, chap. 4, New Code, embodying sec. 8 of the act S. Eq.—22.

of 1875, and the practice thereunder. *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 943.

Warning Order.

The order issued by the court requiring the appearance of the absent defendant to plead, answer, or demur is called the "warning order," and must be personally served unless impracticable, and this must be shown before publication is authorized. *Batt v. Procter*, 45 Fed. 516, 517; *Jennings v. Johnson*, 78 C. C. A. 329, 148 Fed. 337; *Forsyth v. Pierson*, 9 Fed. 801.

The essential difference between a "warning order" and a subpoena is that the subpoena issues as of course, but has no force beyond the district of suit, unless otherwise provided by statute, as before stated, while the warning order can only issue upon application to the court, and only in cases covered by the statute (*United States v. American Lumber Co.* 80 Fed. 313); and may be directed wherever the nonresident can be found. It was not necessary to issue a subpoena and return "not found" as a basis for the warning order (*Forsyth v. Pierson*, 9 Fed. 801; *Batt v. Procter*, 45 Fed. 515), although this has been intimated in *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928; and see *United States v. American Lumber Co.* 80 Fed. 314.

The allegation of the bill as to nonresidence is a sufficient predicate upon which to make the application to the court for a warning order or special order of service (*United States v. American Lumber Co.* 80 Fed. 309; *Mercantile Trust Co. v. Portland & O. R. Co.* 10 Fed. 605, note; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 515; *Batt v. Procter*, 45 Fed. 516); but not when affidavit as to nonresidence made four months before application. *Spreen v. Delsignore*, 94 Fed. 71. The proper practice is to apply for the order of service as the first process, if the allegations of your bill as to the nonresidence of the defendant sought to be served are sufficient, and your cause of action falls within the provisions of the statute, but if the nonresidence of the defendant sought to be served is not shown in the bill, then subpoenas may be issued, and upon a return "not found" you may predicate an application for the "warning order." The forms to be used are as follows:

A. B.	}	In United States District Court for
vs.	{	the.....District of.....
C. D.	}	sitting at
In Equity.		

Now comes A. B., plaintiff in the above cause, and shows to the court that on the..... day of..... A. D. 19.., he commenced suit in this court, the same being a bill to remove cloud, etc. (or an action to try title; or any of the causes mentioned in section of the act authorizing the service) as is shown by the bill (or petition, if at common law) filed in the said court to enforce his equitable (or legal) right to certain real estate therein described (or personal property therein set forth), lying and being situated in the county of..... in the..... district of the State of, and which real estate (or personal property) is therein described as part of the..... (if land here describe as in petition), against C. D., defendant, the said C. D. being citizen of..... (or can be found in.....), the State of..... of the United States of America. That said C. D. resides in (or can be found in)..... county, in the said State of..... (State as particularly as you can the residence of the nonresident or where he can be found, as the warning order must be addressed to the United States marshal of the Federal district of the residence, or the Federal district of the State, where the nonresident can be found.)

Plaintiff further shows that he is a resident citizen and an inhabitant of the State of..... (or that he is a citizen of the State of and a resident and inhabitant of the..... district of said State). That the said defendant is not to be found within the State of..... where the suit is brought, nor has he voluntarily appeared to answer, plead or demur to the bill filed by plaintiff.

Wherefore plaintiff moves the court that its order be granted, entered and served as provided by law, directing the defendant to appear and answer, plead or demur in said cause by a day certain to be designated by this court.

R. F.,
Solicitor, etc.

If there be several nonresident defendants, the specific residence or place where to be found must be stated as to each.

If the defendant be a corporation, then say:

And the....., a corporation created, organized and existing under the laws of the State of....., of which said corporation one M..... is president, who is a citizen of (or can be found in) the State or..... and one N..... is secretary, who is a citizen or (or can be found in) the State of....., and that the said corporation and the said M..... and the said N..... are all residents and inhabitants of (or can be found in) the county of..... in the State of....., etc.

There is nothing in the act requiring the motion or application to be sworn to, but in *Forsyth v. Pierson*, 9 Fed. 803, it is intimated that it should be supported by affidavit as to the

truth of the allegations made. *Woods v. Woodson*, 40 C. C. A. 565, 100 Fed. 518.

With the motion prepare and present an order as follows:

Title and commencement as in motion.

On this day at the..... division of the Circuit Court of the United States in and for the..... district of....., came on to be heard the application of A. B., plaintiff in the above styled and numbered cause, for an order directing the absent defendant C. D. (or defendants C. D. and E. F., or....., a corporation, etc., describe as in motion, stating president and secretary, etc.) to appear and plead, answer or demur herein by a day certain to be designated by the court. And it appearing to the court that this suit is commenced by plaintiff, who is a resident citizen and inhabitant of the State of..... (or of..... as stated in the motion), to enforce an equitable (or legal, if at law) claim to land situated in the county of....., in the State of, being in thedistrict of said State, the said suit being to remove cloud (or whatever it may be) and the said C. D., defendant therein named, is not an inhabitant of the said.....district of, nor is he to be found in said State and has not voluntarily appeared in said suit.

And the court being of opinion that said application should be granted, it is ordered that the said C. D., defendant, shall appear, plead, answer or demur to the bill (or petition) of plaintiff on or before the.....day of.....A. D. 19.., the same being the first Monday (or whatever day it may be in the term) at the next term of this court (or the term now in session) at the court room thereof in the city of....., in the county of....., in the State of

That certified copies of this order and plaintiff's bill (or petition) be served on the said C. D. days before the date above named and that service be made on said defendant C. D. by the United States marshal for the.....District of the State of.....

This order should always be obtained in open court, and should the suit be pending in one division of a district, you may apply to the court in session in any other division of the district, for the order. If you should apply out of the division of the district where the suit is pending, you should add to the order granted by the court the following:

It is further ordered that the clerk of this court enter this order of record and certify the same to the.....division at.....for record and observance.

Done in open court in the city of....., in the State of....., this the.....day of.....A. D. 19...

I. M.,
United States Judge.

See *Kent v. Honsinger*, 167 Fed. 624.

The clerk of the court where suit is pending should deliver certified copies of the order to plaintiff's counsel, who should forward them to the marshal of the district set forth in the order, and copies of the order are to be delivered by the clerk of the court to the marshal of the district where the suit is pending, to be served on the parties in charge of or in possession of the property in suit, if any such person or persons be in possession or charge.

The United States marshal serving the order on the nonresident makes the service and return as provided by statute and rules of equity, in serving and returning subpoenas, and must return the order, with return of service thereon, to the clerk of the court in which the suit is pending. *Forsyth v. Pierson*, 9 Fed. 801; *Woods v. Woodson*, 40 C. C. A. 565, 100 Fed. 517; *Elk Garden Co. v. T. W. Thayer Co.* 179 Fed. 558.

If upon the return of the order it appears that service was made the full number of days before the day of appearance designated in the order, then the cause may proceed under the rules of equity.

If the cause be at common law and the parties do not appear, you may take judgment by default, and if in equity you may enter a decree *pro confesso*, and proceed *ex parte* under the rules of equity. *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625.

How Served.

Must be served by the marshal or his deputy of the Federal district where defendant resides. *Forsyth v. Pierson*, 9 Fed. 801.

Publication, Service By.

It often happens that you do not know where the defendants, or defendant, resides or can be found, so that it is impracticable to apply for, or get, personal service of the warning order. In such case the statute permits service by publication.

In this case your petition or motion must be drawn with this view and in the form already given, except that it must be stated that personal service is impracticable because the

residence or place where the defendant may be found is unknown; that you have used due diligence to discover the residence or whereabouts of the unknown defendant, stating what diligence you have used. In a word, the facts must show the impracticability of personal service mentioned in the statute. *Batt v. Procter*, 45 Fed. 516; *McDonald v. Cooper*, 32 Fed. 745. You must ask an order of publication as to the defendant whose residence and citizenship is unknown. The court may direct the manner of publication of the "warning order," though it cannot be for less than six weeks, as prescribed by the statute; that is, once each week for six successive weeks. *Dick v. Foraker*, 155 U. S. 411, 412, 39 L. ed. 204, 15 Sup. Ct. Rep. 124; *United States v. American Lumber Co.* 80 Fed. 314, 315; *Beattie v. Wilkinson*, 36 Fed. 649; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512.

The warning order must be published as directed by the court, and if the defendant does not appear in obedience to its mandate, and answer, plead, or demur within the time stated in the order, then, upon proof of the publication of the order made in the manner ordered, the court will proceed to adjudicate the case; provided, however, that the defendant may within one year from the judgment enter his appearance and set it aside on payment of costs. The courts have strictly construed the act, and held that personal service of the "warning order" must be made if practicable. *Batt v. Procter*, 45 Fed. 515. The advantage of personal service is of great value to plaintiff, if it can be possibly obtained, as in such case the decree has the ordinary effect from entry, while by publication you have only a conditional decree for one year from entry, and within the time preventing any disposition of the property involved in the suit.

It sometimes happens, when there are several defendants, that the residence of some may be known and others unknown; in such case you should file separate motions or petitions, and prepare separate orders, as the substance and prayer in each case are entirely different, as seen above.

When publication is ordered the court designates the newspaper and time of publication, not less than six weeks, and the manner of publication must be strictly pursued; no other

method than that designated would be legal. *Ibid.*; *McDonald v. Cooper*, *supra*; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 712.

This method of service, as will be seen, is somewhat similar to that prescribed by the statutes of Texas (*Batts' Rev. Stat.* 1230 to 1235) providing for service on nonresident defendants and defendants whose residence is unknown.

By the State statute any disinterested citizen of the State where the nonresident citizen resides or may be found may serve the notice of suit, and make affidavit of its delivery as a proper return of service, but in the Federal courts the order must be served by a United States marshal of the district of which the citizen to be served is a resident, or can be found. *Batts' Rev. Stat.* 1231.

Again, in the State statutes, four weeks' (*Batts' Rev. Stat.* 1235) consecutive publication is sufficient, while six weeks is the minimum in the Federal court. The mode provided by Congress is exclusive. *U. S. Supp.* 1874, 91, p. 84; *Bracken v. Union P. R. Co.* 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 449.

Having thus given the act and the form that may be used in effecting service under it, I will now briefly refer to a few cases interpreting the act.

As stated, the act does not enlarge the jurisdiction, but gives greater scope to the process of the courts in a certain class of cases of which the Federal courts have jurisdiction. *Greeley v. Lowe*, 155 U. S. 65, 39 L. ed. 70, 15 Sup. Ct. Rep. 24; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625; *Eldred v. American Palace Car Co.* 103 Fed. 211. The act includes suits to enforce any legal or equitable claim to, or lien upon, or to remove cloud from the *title* of real or personal property *within the district where suit is brought*. *Ibid.*; *Spencer v. Kansas City Stockyards Co.* 56 Fed. 745; *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 157; *York County Sav. Bank v. Abbot*, 131 Fed. 983, see S. C. 139 Fed. 993; *Winter v. Koon*, 132 Fed. 273; *Seybert v. Shamokin & Mt. C. Electric R. Co.* 110 Fed. 810. It was not intended to cover anything but real and tangible property susceptible of being reduced to actual posses-

sion, and not incorporeal and intangible interests (Non-Magnetic Watch Co. v. Association Horlogere Suisse, 44 Fed. 6), as patent right. Ibid.; York County Sav. Bank v. Abbot, 139 Fed. 993; Eldred v. American Palace Car Co. 45 C. C. A. 1, 105 Fed. 455.

Title to Stock.

In Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559, suit was brought in Michigan Federal district against a corporation of Michigan and citizens of Massachusetts holding certificates of stock. Plaintiff claimed title to the shares of stock so held, and sought a decree removing cloud from the title. It was held that the certificates of stock were only evidence of the ownership of the shares, and the interest represented by the shares was held by the company for the benefit of the true owner; that suit could be brought against the company in its residence district, and nonresident parties claiming ownership of the certificates of stock could be brought in under section 8 to try the title. Ibid. 177 U. S. 13, 82 Fed. 778, overruled; Ryan v. Seaboard & R. R. Co. 83 Fed. 889. But not where the stock is not held by a defendant who resides within the State where the suit is brought. McKane v. Burke, 132 Fed. 688. See Jones v. Gould, 80 C. C. A. 1, 149 Fed. 153. The statute applies to establish a lien on stock. Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228.

Suit to Cancel for Fraud.

In Evans v. Charles Scribner's Sons, 58 Fed. 303, it was held that service under section 738 to cancel a deed for fraud to property within the district of suit could be had, but not to set aside transfers of life policies not within the district issued by a foreign company. Castello v. Castello, 4 McCrary, 543, 14 Fed. 207. So may cancel a note for fraud. Manning v. Berdan, 132 Fed. 382-385. Or contract to convey.

Specific Performance.

It has been held that the act does not apply to a suit for

specific performance of a contract to convey land, Municipal Invest. Co. v. Gardiner, 62 Fed. 954, unless the State statute provided for constructive service in such cases, and that the judgment therein shall be in effect a conveyance. *Single v. Scott Paper Mfg. Co.* 55 Fed. 553; *Bennett v. Fenton*, 10 L.R.A. 500, 41 Fed. 283; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557. But in a suit by a vendee for specific performance, if there is a condition precedent that an abstract of title shall be furnished, and upon failure damage is to be given, then the statute does not apply. See *Adams v. Heckscher*, 83 Fed. 281, 282, S. C. 80 Fed. 742.

Suit to Remove Cloud.

A suit to remove cloud (*Morris v. Graham*, 51 Fed. 53; *Arndt v. Griggs*, supra), comes within the statute (*Lynch v. Murphy*, 161 U. S. 251, 252, 40 L. ed. 689, 16 Sup. Ct. Rep. 523; *Brown v. Pegram*, 143 Fed. 701; *Miller v. Ahrens*, 150 Fed. 644); or by a creditor to set aside a conveyance (*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; *Evans v. Charles Scribner's Sons*, supra); or to cancel a land patent (*United States v. American Lumber Co.* 80 Fed. 309).

Foreclosure of Liens.

Suits to foreclose liens (*York County Sav. Bank v. Abbot*, 131 Fed. 980, but see 139 Fed. 993; *Ames v. Holderbaum*, 42 Fed. 341; *Deck v. Whitman*, 96 Fed. 890; *Grove v. Grove*, 93 Fed. 865; *Lancaster v. Asheville Street R. Co.* 90 Fed. 132), or to enjoin foreclosure (*Dupont v. Abel*, 81 Fed. 534), come within the statute; or to cancel a mortgage (*Mellen v. Moline Malleable Iron Works*, supra). So a lien on a specific fund (*Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229). So in a suit to establish a trust, service may be had on a nonresident though there be a prayer for accounting (*Porter Land & Water Co. v. Baskin*, 43 Fed. 323).

Trying Title.

Actions to try title at law are within the statute (*Spencer*

v. Kansas City Stock-Yards Co. 56 Fed. 741); or a suit to partition land (Greeley v. Lowe, 155 U. S. 58, 74, 39 L. ed. 69, 75, 15 Sup. Ct. Rep. 24). "Title" in the act is explained in Jones v. Gould, *supra*.

Unknown Heirs.

We see, then, by virtue of section 8 of the act of 1875, where it is impracticable to get personal service on an absent defendant, as where the residence or habitation of the defendant is unknown, you may serve by publication in the class of cases mentioned in said section; but the question arises, can you sue unknown heirs in the Federal courts in those States where such suits are permitted, as in Texas (see Batts's Rev. Stat. 1236), which provides that a party having a claim against property which may have accrued to the heirs of a deceased person, may sue the heirs whose names are unknown and obtain service by publication. Webster v. Willis, 56 Tex. 468; O'Leary v. Durant, 70 Tex. 409, 11 S. W. 116; Texas Rev. Stat. 1911, art. 1875; Gibson v. Oppenheimer, — Tex. Civ. App. —, 154 S. W. 695.

It may be stated that while the Federal courts may sustain a judgment recovered in a State court permitting such service (Arndt v. Griggs, *supra*; Ormsby v. Ottman, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 494, 495; Connor v. Tennessee C. R. Co. 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 936; Lynch v. Murphy, *supra*), if the statute has been strictly pursued, and where such judgment is brought collaterally in issue in the Federal court (Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 148, 35 L. ed. 120, 11 Sup. Ct. Rep. 512; Hollingsworth v. Barbour, 4 Pet. 473-475, 7 L. ed. 925, 926; Harris v. Hardeman, 14 How. 345, 14 L. ed. 449), yet an original suit cannot be brought in the Federal courts and service perfected under the statute providing for service against "unknown heirs." Many reasons may be stated why State statutes of this character cannot be followed in the Federal courts, where citizenship enters so largely into questions touching the jurisdiction of these courts, but the principal reason may be found in the fact that Congress has legislated upon the subject of "service by publication," and having

extended it only to cases where the residence of the defendant is unknown, so as to make it impracticable to serve him personally, it excludes from these courts any other conditions upon which such service can be made. As has been repeatedly said, where Congress has legislated upon a particular subject, State legislation upon the same subject is superseded in Federal courts. *Braken v. Union P. R. Co. supra.*

CHAPTER LVII.

SCANDAL AND IMPERTINENCE.

If the bill, answer, or any pleading is scandalous or impertinent, it may be expunged under new rule No. 21, which is as follows: The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent, or scandalous matter stricken out, upon such terms as the court shall think fit.

Unnecessary allegations bearing cruelly on the moral character of an individual, or anything stated contrary to good manners or to hear which would offend the dignity of the court, are scandalous. *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55. If, however, the matter be relevant, though injurious, it is not scandalous. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 379; *Burden v. Burden*, 124 Fed. 255; *South & N. A. R. Co. v. Railroad Commission*, 171 Fed. 225; *Mound City Co. v. Castleman*, 171 Fed. 521.

Impertinence consists in allegations irrelevant to the issues, which includes tautology and verbosity; also unnecessary recitals of written instruments, now forbidden by the requirements of rule No. 25. *Harrison v. Perea*, 168 U. S. 318, 42 L. ed. 481, 18 Sup. Ct. Rep. 129; *Polk v. Mutual Reserve Fund Life Asso.* 128 Fed. 524; *Electrolibration Co. v. Jackson*, 52 Fed. 776; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55-61. By rule No. 21 objections to pleadings for scandal or impertinence are no longer raised by exceptions, but by a motion to strike out, or on suggestion, or on the court's own initiative, the objectionable allegations may be stricken out. If raised by motion it may be drawn as follows:

Title as in bill.

Now comes the plaintiff (or defendant) and moves the court to strike out so much of the allegations of the bill or answer) as set up (here

state the objectionable matter) because the said allegation is scandalous (or impertinent) in that it cruelly attacks the character of, or the language is indecent or contrary to good morals, (or if impertinent) the language of the pleading is disconnected, tautological, verbose and not pertinent to the issue. Wherefore, he prays, etc.

The motion must be signed by counsel, and must be filed after the process on the bill is returnable, or, if taken to the answer, after the answer has been filed and within twenty days from the bill or answer. *Hall v. Bridgeport Trust Co.* 122 Fed. 163; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55; *Polk v. Mutual Reserve Fund Life Asso.* 128 Fed. 526; *Hobbs Mfg. Co. v. Gooding*, 100 C. C. A. 83, 176 Fed. 264. See *United States v. Kettenbach*, 175 Fed. 463. The objection is purely formal and technical, and its simple purpose is to force clearness of pleading, and the court should not permit any delay in presenting the objection.

By new rule 24 the signature to the bill by counsel is a certificate that the bill contains no scandalous matter. In dealing with objections of this character, and particularly because of impertinence in the bill, they should not be allowed unless it is clear that the objectionable matter cannot be material to the plaintiff's case. *Wells, F. & Co. v. Oregon R. & Nav. Co.* 15 Fed. 561. If it is doubtful as to its being material, the matter will be permitted to remain until final hearing.

CHAPTER LVIII.

DISMISSAL OF BILL BY PLAINTIFF.

The bill having been filed and process issued, I will now discuss what steps plaintiff may take to dismiss his bill.

The dismissal of a bill is either voluntary by plaintiff, or involuntary by the court on motion, or by the court on its own motion. Involuntary dismissals will be discussed under defenses in equity.

The general rule is that the plaintiff has the right, at any time before an interlocutory or final decree in a case, to dismiss it on paying costs, and without prejudice to his right to file another, and where the dismissal will deprive the defendant of no substantial right accrued since the suit commenced and the defendant has not prayed for affirmative relief to which he would be entitled. *Morton Trust Co. v. Keith*, 150 Fed. 606; *Houghton v. Whitin Mach. Works*, 160 Fed. 227; *Gilmore v. Bort*, 134 Fed. 659; *McCabe v. Southern R. Co.* 107 Fed. 214; *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.* 121 Fed. 1015; *Ebner v. Zimmerly*, 55 C. C. A. 430, 118 Fed. 818; *United States ex rel. Coffman v. Norfolk & W. R. Co.* 55 C. C. A. 320, 118 Fed. 554; *Welsbach Light Co. v. Mahler*, 88 Fed. 427; *Chicago & A. R. Co. v. Union Rolling Mill Co.* 109 U. S. 702-713, 27 L. ed. 1081-1085, 3 Sup. Ct. Rep. 594; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 145, 43 L. ed. 108, 111, 18 Sup. Ct. Rep. 808; *Stevens v. The Railroads*, 4 Fed. 97-105; *Detroit v. Detroit City R. Co.* 55 Fed. 572; *Carlisle v. Smith*, 224 Fed. 231; *Tower v. Stimpson*, 175 Fed. 130. This general rule has its conditions and exceptions.

In the first place, you cannot dismiss without a motion and notice, and an order of the court; dismissal by an order as of course is not known in the Federal practice. This means that the pleading must be submitted to the court, and there must be the exercise of some discretion in granting it. Electrical Ac-

accumulator Co. v. Brush Electric Co. 44 Fed. 604; Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 838; Penn Phonograph Co. v. Columbia Phonograph Co. 66 C. C. A. 127, 132 Fed. 809.

Again, the plaintiff cannot dismiss where such dismissal would prejudice the defendant, or where rights have been fixed by an interlocutory decree (see authorities cited above; Callahan v. Hicks, 90 Fed. 539; Pullman's Palace Car Co. v. Central Transp. Co. 49 Fed. 261; Electrical Accumulator Co. v. Brush Electric Co. 44 Fed. 604, 605; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87; Hershberger v. Blewett, 55 Fed. 172), or where the defendant seeks affirmative relief. *Ibid.* The refusal to dismiss when the rights of the defendant may be prejudiced does not mean that by the dismissal he may be burdened by another suit, but the record must show some right upon which he should be heard and which is properly in issue. Western U. Teleg. Co. v. American Bell Teleph. Co. 50 Fed. 664; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 161, 43 L. ed. 108, 117, 18 Sup. Ct. Rep. 808. Especially is this the case when an issue has been sent to the master and decided for defendant. Detroit v. Detroit City R. Co. 55 Fed. 572.

So, where parties agree to refer to a master, the plaintiff cannot dismiss. American Bell Teleph. Co. v. Western U. Teleg. Co. 16 C. C. A. 367, 21 U. S. App. 627, 69 Fed. 666, overrules 50 Fed. 662. See Walters v. Western & A. R. Co. 69 Fed. 710.

Again, the plaintiff will not be allowed to dismiss, if in the light of the proceedings the defendant is reasonably entitled to a decree. Chicago & A. R. Co. v. Union Rolling Mill Co. 109 U. S. 713-716, 27 L. ed. 1085-1087, 3 Sup. Ct. Rep. 594; Hershberger v. Blewett, 55 Fed. 170; Pullman Palace Car Co. v. Central Transp. Co. 171 U. S. 146, 43 L. ed. 112, 18 Sup. Ct. Rep. 808. But if the circumstances were such that on final hearing the plaintiff would be allowed to dismiss without prejudice, then a dismissal without prejudice may be permitted. Stevens v. The Railroads, 4 Fed. 97.

Again, if nothing has been done for two years after it has been at issue, plaintiff will not be allowed to dismiss. Welsbach Light Co. v. Mahler, *supra*. Plaintiff cannot dismiss where

new action would bar defendant's relief. *Callahan v. Hicks*, 90 Fed. 543.

Where there is more than one plaintiff, any one of them may dismiss as to himself, if without prejudice to other parties, or may dismiss as to one or more defendants under similar conditions. The motion to dismiss may be as follows:

Title as in bill.

To the Honorable Judge of the District Court of the United States in and for the District of the State of:

Your petitioner, having exhibited his bill in this honorable court on the day of A. D. 19.., against C. D., defendant, is, since the filing of the same, advised to proceed no further; wherefore he prays that the bill may stand dismissed without prejudice.

R. F.,
Solicitor, etc.

This form is sufficient, noting, however, the following conditions:

First. If the defendant has not appeared, so state, and the court will grant the dismissal.

Second. If the defendant has appeared, so state, and further state if any action has been taken by him, and, if so, what.

Third. If the defendant has appeared and taken action, but consents to the dismissal, then let his solicitor sign the motion with plaintiff's solicitor.

The motion may be heard in vacation, or any motion day, proper notice having been given of the application.

The practice in dismissing is to use the words "without prejudice," for if you do not, the presumption is that it was heard on its merits. *Graves v. Faurot*, 64 Fed. 242; *Howth v. Owens*, 30 Fed. 911; *Durant v. Essex Co.* 7 Wall. 109, 19 L. ed. 156; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 702, 31 L. ed. 841, 8 Sup. Ct. Rep. 1024; *Garner v. Second Nat. Bank*, 89 Fed. 636; *Stratton v. Essex County Park Commission*, 145 Fed. 436. We have then the rule.

A decree dismissing a bill generally may be set up as a bar, but if dismissed "without prejudice," or on grounds other than on merit, it cannot be set up in bar. *Walden v. Bodley*, 14 Pet. 161, 10 L. ed. 400; *United States Fastener Co. v. Bradley*, 143 Fed. 530; *Clark v. Bernhard Mattress Co.* 82 Fed. 340. *Ex parte Loung June*, 160 Fed. 254.

So, dismissal by consent, showing no adjustment, cannot be set up in bar to a second suit. *Marshall v. Otto*, 59 Fed. 249. Nor is it appealable, because not final if dismissed without prejudice. *Fidelity Ins. Trust & S. D. Co. v. Dickson*, 24 C. A. 60, 46 U. S. App. 691, 78 Fed. 207.

A voluntary dismissal will not be reinstated unless there is fraud or mistake. *Willard v. Wood*, 164 U. S. 521, 41 L. ed. 539, 17 Sup. Ct. Rep. 176. (See "Dismissal by Defendant," chap. 73, p. 442; "Effect on Cross Suit," chap. 74, p. 455.

S. Eq.—23.

CHAPTER LIX.

AMENDING BILL.

I will now discuss what steps the plaintiff should take to perfect his bill when, through inadvertence or change in conditions, it becomes necessary.

First. When he can amend his bill.

Second. When he must file a supplemental bill.

Third. When he must file a bill of revivor.

Office of Amendment.

Amendments are intended to cure defective pleadings. *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 120. Section 954, U. S. Rev. Stat. Comp. Stat. 1913, sec. 1591; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171-177. And under new rule No. 19, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading.

When the Bill Can Be Amended.

New rule No. 28, embodying old rules 28, 29 and 30 is as follows:

Rule No. 28. The plaintiff may, as, of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by court or judge. After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

We have then, first, the plaintiff may amend as of course, his bill before the defendant has responded thereto. Second, if the amendment is filed after any copy has issued from the clerk's office, the plaintiff, at his own cost, shall furnish to the solicitor of record of each opposing party a copy of the bill as amended unless otherwise ordered by the court. Third, when the plaintiff is required to serve the amendment on the solicitor or solicitors of the party or parties defendant, he must furnish a copy of the bill as amended, and not simply the amendment proposed as under the old rules.

Amendments Not of Course.

The last clause of the new rule 28 as above set forth, provides that after a pleading or any defense is filed in the cause the right to amend must be by consent of the defendant or leave of the court (old rule No. 29). *Gubbins v. Laughtenschlager*, 75 Fed. 619; *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815. The matter is in the hands of the court, and is not reviewable unless there is a clear abuse of discretion. *McKemey v. Supreme Lodge, A. O. U. W.* 104 C. C. A. 117, 180 Fed. 966, 967; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, overruling *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158. The matter of costs is discretionary with the court. *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 754.

By new rule No. 20 the court may, upon motion, order a further and better statement of the nature of the claim or the defense, or further and better particulars of any matter stated in any pleading, and upon such terms as to costs and otherwise as may be just. Under new rule No. 31 the cause is at issue when the answer is filed, replications having been abolished except in special instances, and the requirements under old rule No. 29, directing amendments after replication filed, no longer apply, having been superseded by new rule No. 28, providing for amendments after answer by consent of the judge, or the other party, by simple motion, which the judge may grant on such terms as may be deemed necessary to speed the cause. *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*) 10 Wall. 299, 19 L. ed. 894. The

plaintiff should file the amended bill or pleading as presented to the court, at once, if granted by the court; otherwise the cause will proceed as if no amendment had been applied for. *Boston & A. R. Co. v. Parr*, 98 Fed. 484.

Sometimes the answer makes it necessary to amend the bill. This must be done on motion, and leave will be granted, with or without costs, as to the court may seem proper. Equity rule 28; *Southern P. R. Co. v. United States*, 168 U. S. 55, 42 L. ed. 379, 18 Sup. Ct. Rep. 18.

However, where the answer includes a set-off or counterclaim, the plaintiff may, within ten days after filing the answer, unless a longer time is allowed, file a replication to the set-off or counterclaim, and need not amend his bill to meet the new matter. New rule 31.

Such are the rules prescribed for amending a bill in equity by plaintiff, but the power of a court of equity to grant an amendment at any stage of the case seems to rest alone in the discretion of the court, unhampered by rules, if justice requires the amendment. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Equity rules 19-28; U. S. Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 754 and cases cited; *United States v. American Bell Teleph. Co.* 39 Fed. 716; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 598-602; *Neale v. Neale*, 9 Wall. 8, 9, 19 L. ed. 591, 592; *Re Glass*, 119 Fed. 511.

It has been frequently declared that the power to permit amendments must be controlled by the case, and not by stated rules, and it has been the practice of Federal courts to be guided by the special circumstances in permitting amendments at any stage of the proceedings. *Hardin v. Boyd*, 113 U. S. 761, 28 L. ed. 1141, 5 Sup. Ct. Rep. 711; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 754; *Gubbins v. Laughtenschlager*, 75 Fed. 619. And the granting or refusing amendments, being a matter of discretion, will not be revised by an appellate court, unless there be an apparent gross abuse of the court's discretion. *Wright v. Hollingsworth*, 1 Pet. 168, 7 L. ed. 98; *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. Rep. 558; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 552; *Chapman v. Barney*, 129 U. S. 677, 32

L. ed. 800, 9 Sup. Ct. Rep. 426; *Blalock v. Equitable Life Assur. Soc.* 21 C. C. A. 208, 41 U. S. App. 761, 75 Fed. 47.

While it is not proper to sacrifice the ends of justice to rigid technical rules, yet upon the other hand, this nonrevisable discretion of the chancellor has some disadvantages. However, it will be seen that, as the cause progresses, the courts, as they should do, use greater caution in permitting amendments, and preventing, if possible, inconvenience and expense. *Gibbins v. Laughtenschlager*, 75 Fed. 619; *Hodges v. Kimball*, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 851; *Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348. Thus, after the cause has been prepared for trial, and hearing had, and fully submitted, the discretion of the chancellor is not easily moved to grant an amendment on material matters. *Gubbins v. Laughtenschlager*, 75 Fed. 619, and authorities.

Amendments At and After Trial.

But we find cases where the courts have not hesitated to permit the pleadings to be changed and adapted to the proofs at any stage of the cause after issue joined. U. S. Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591; *Manitowoc Malting Co. v. Fuechtwanger*, 169 Fed. 983; *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Burgess v. Graffam*, 10 Fed. 219; *Bass v. Christian Feigenspan*, 82 Fed. 260; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 755; *Collinson v. Jackson*, 8 Sawy. 357, 14 Fed. 305; *Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 568, 15 Mor. Min. Rep. 314; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 692; *Nellis v. Pennock Mfg. Co.* 38 Fed. 379; *Re Sanford Tool Co.* 160 U. S. 259, 40 L. ed. 417, 16 Sup. Ct. Rep. 291. New rule 19.

In *Neale v. Neale*, 9 Wall. 1-12, 19 L. ed. 590-593, the cause had been heard but decree not entered, but it appeared that the evidence showed a different case for equitable relief than stated in the bill, but supported a case for equitable relief. The court permitted an amendment to conform to the proof, stating that it was clearly in the court's discretion, but it has been

uniformly held that the amendment must be consistent with the substance of the original bill, that is, you will not be permitted to make a new suit by amendment either as to parties or cause of action. (Authorities above); *Confectioners' Machinery & Mfg. Co. v. Racine Engine & Mach. Co.* 163 Fed. 918; *Pendery v. Carleton*, 30 C. C. A. 510, 59 U. S. App. 288, 87 Fed. 41. Where, after pleadings are closed and evidence taken it becomes necessary to amend, it must be done by amendment, and not by a substituted bill. *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 176 Fed. 746. *Galesburg & K. Electric R. Co. v. Hart*, 136 C. C. A. 533, 221 Fed. 12, 13. Rule 19.

In the instances where amendments have been permitted after issue joined and proofs taken, it will be seen that it was shown the plaintiff was entitled to equitable relief under the general prayer, though it may be different from that sought in the special prayer. *Ibid.*; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Walden v. Bodley*, 14 Pet. 164, 10 L. ed. 401; *Bass v. Christian Feigenspan*, 82 Fed. 261; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 414, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188.

Under the old rules it was held that a change in interest of parties cannot be introduced by amendment. *Land Co. v. Elkins*, 22 Blatchf. 204, 20 Fed. 546; *The Ask*, 156 Fed. 681, 682; *Savage v. Worsham*, 104 Fed. 18, 19; *Maynard v. Green*, 30 Fed. 644; *Judson v. Courier Co.* 25 Fed. 706; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 38 Fed. 58, but new rules 19 and 37, authorizing amendments with the consent of the court at any stage of the proceeding, and permitting any party at any time to be made a party if his presence is necessary to a complete determination of the cause, would seem to admit by amendment parties acquiring an interest pending the suit. However, the better practice would be to introduce the party by a supplemental bill, under new rule 34. See "Supplemental Bill," chap. 61.

Again, it has been frequently decided that amendments under old rule 29, now new rule 28, sought to be made after issue joined, are not to be made to strengthen plaintiff's case, or change the character and quantity of relief, but to enable the court to do complete justice when a case for relief is made out,

and not specifically asked for in the prayer. *Ibid.*; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Maynard v. Green*, 30 Fed. 644; *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 176 Fed. 746; *The Tremolo Patent*, 23 Wall. 527, 23 L. ed. 98.

But by new rule 20 "plaintiff may strengthen his case by a better statement of the nature of his claim, or a further and better statement of particulars of any matters stated in any pleading, upon such terms as the court may order." It is in the discretion of the court. *Gimbel Bros. v. Adams Exp. Co.* 217 Fed. 318; *Maxwell Steel Vault Co. v. National Casket Co.* 205 Fed. 515.

Amendments should harmonize, or at least be germane to the whole case. *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. 217; *Richmond v. Irons*, 121 U. S. 46, 47, 30 L. ed. 870, 871, 7 Sup. Ct. Rep. 788. In *Shields v. Barrow*, 17 How. 143, 15 L. ed. 161, a bill to set aside an agreement for fraud was not permitted to be amended so as to ask for specific performance. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 448; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 551.

Again, when the matter has not been sufficiently put in issue by the bill, or when the prayer is not consistent with the case made, the court will permit an amendment at the trial (*Grafham v. Burgess*, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Hardin v. Boyd*, 113 U. S. 761, 28 L. ed. 1142, 5 Sup. Ct. Rep. 771), and make the prayer conform to the proof. *Ibid.*; but see *Bass v. Christian Feigenspan*, 82 Fed. 261; *Maynard v. Green*, 30 Fed. 644. In *Cotten v. Fidelity & C. Co.* 41 Fed. 510, it was held that an amendment may be filed at any time before decree to bring the merits fairly to trial, but some courts have held that if the facts were known, or ought to have been known, leave to file an amendment after the facts are in will be refused.

Thus in *Gubbins v. Laughtenschlager*, 75 Fed. 622, the suit began in 1892, and the decision was filed in 1896, when the amendment was sought to be made, but it was denied because no reason was shown why the point was not sooner presented; but you will find in *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008 and *Calloway v. Dobson*, 1 Brock. 119, Fed. Cas.

No. 2,325 an amendment was permitted, though the facts were known, but not deemed material.

In *Graffam v. Burgess*, 117 U. S. 197, 29 L. ed. 844, 6 Sup. Ct. Rep. 686, a formal charge of fraud was permitted to be added at the trial by amendment.

In *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 57, it was held that you may strike out an allegation, or leave out parties at the trial, and change the allegation and prayer. *Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348. So you may add a claim inadvertently omitted. *Nellis v. Pennock Mfg. Co.* 38 Fed. 379. Or dismiss a party. *Victor Talking Mach. Co. v. American Graphophone Co.* 118 Fed. 50.

As to the practice of the Texas courts in allowing amendments during the progress of the case, see *Fidelity & C. Co. v. Carter*, 23 Tex. Civ. App. 359, 57 S. W. 316, and authorities.

As to amending as to parties, generally, see end of chap. 46.

Amendment After Decree.

In the *Tremolo Patent*, 23 Wall. 518, 23 L. ed. 97, the court says you may amend your bill after decree, if the cause was tried as if the bill had contained the averment sought to be made, and defendants would not be prejudiced by the amendment. *Graffam v. Burgess*, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686; *Re Glass*, 119 Fed. 511; *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.* 20 Fed. 505; *Zeillin v. Rogers*, 10 Sawy. 200, 21 Fed. 103; *Gubbins v. Laughtenschlager*, 75 Fed. 620; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 692.

Amendment to Cure Jurisdiction.

You may amend to cure jurisdiction, thus when proper jurisdictional allegations are not made,—as, where “residence,” and not “citizenship,” is alleged, the appellate courts have reversed, permitting the bill to be amended. *New rule 19. Stockwell v. Boston & M. Co.* 131 Fed. 153; *Sambo v. Union P. Coal Co.* 146

Fed. 80; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 540, 48 L. ed. 784, 24 Sup. Ct. Rep. 576; *Betzoldt v. American Ins. Co.* 47 Fed. 705; *Marthinson v. Win-yah Lumber Co.* 125 Fed. 633; *King Bridge Co. v. Otoe County*, 120 U. S. 227, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Metcalf v. Watertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. It is in the discretion of the court. *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539; *Chicago, R. I. & P. R. Co. v. Stephens*, 134 C. C. A. 263, 218 Fed. 535. See act of Congress March 3d, 1915, allowing appellate court to amend to show jurisdiction.

So, where objection to the jurisdiction of the court has been sustained, the plaintiff has a right to amend the bill (Equity rule 19; *Ins. Co. of N. A. v. Svendsen*, 74 Fed. 347; *Hardon v. Boyd*, 113 U. S. 761, 28 L. ed. 1142, 5 Sup. Ct. Rep. 771; *Riggs v. Brown*, 172 Fed. 637) by striking out or shifting parties. After decree *pro confesso* on bill showing no jurisdiction, amendment was allowed to cure it (*Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376; *Atchison, T. & S. F. R. Co. v. Gilliland*, 113 C. C. A. 476, 193 Fed. 608; *McEldowney v. Card*, 193 Fed. 476); but it seems that where facts are to be alleged, as in equity new rule 27, to give a Federal court jurisdiction, you cannot amend to give jurisdiction (*Dickinson v. Consolidated Traction Co.* 114 Fed. 233), not to defeat jurisdiction (*Gibbins v. Laughtenschlager*, 75 Fed. 616).

Amendment as to Amount.

You may amend as to amount if not definitely stated. *Home Ins. Co. v. Nobles*, 63 Fed. 641; *Bureau of National Literature v. Sells*, 211 Fed. 383, 384, and cases cited. See Affidavit to show amount (end of chap. 33; chap. 35, p. 205).

Effect of Amendment.

Amending a bill is a continuation of the original, if no new parties are made (*French v. Hay* [*French v. Stewart*] 22 Wall. 246, 22 L. ed. 856), or new suit (*Columbia Valley R. Co. v. Portland & S. R. Co.* 89 C. C. A. 361, 162 Fed. 609).

If the amendment is of a material matter, time must be allowed the defendant to answer. *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378. By new rule 32, it is provided that where the amendment to the bill is made after the answer is filed, the defendant shall put in a new or supplemental answer, within ten days after the amendment or amended bill is filed, unless further time is given; upon failure to do so *pro confesso* may be taken. Equity rules 12, 16, 29. It authorizes the defendant to put in an entirely new answer (*Blythe v. Hinkley*, 84 Fed. 244; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378; *North Chicago Street R. Co. v. Chicago Union Traction Co.* 150 Fed. 631-633); and may state under new rule 30 as many defenses, in the alternative, regardless of consistency, as he deems essential to his defense.

If an amendment is allowed on hearing an interlocutory injunction, it takes effect at once, if no new parties are made. *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3*, 90 Fed. 598; U. S. Rev. Stat. sec. 954; Comp. Stat. 1913, sec. 1591. Or if the merits are not particularly affected by the amendments and new parties, requiring further process, the plaintiff may proceed without further answer. In *Columbia Valley R. Co. v. Portland & S. R. Co.* 89 C. C. A. 361, 162 Fed. 603. A distinction is drawn as to time of taking effect between an amended bill and amendments to a bill. An amended bill speaks from the time it is filed, and not from the filing of the original bill.

In *North Chicago Street R. Co. v. Chicago Union Traction Co.* 150 Fed. 613, it was strenuously urged and sustained that an amendment to a bill does not entitle the defendant to answer anew the entire bill, but only the amended matter.

Motion to Amend.

Where the amendment is not of course, and is sought after answer, a motion must be filed asking permission. Rule No. 28. *Riggs v. Brown*, 172 Fed. 637; *Boston & A. R. Co. v. Parr*, 98 Fed. 484, unless the defendant consents to the amendment. Equity rule 28, clause 2.

Form of Motion.

Title as in bill.

And now comes plaintiff and begs leave to file in this cause the amended bill, a copy of which is hereto attached.

R. F.,
Solicitor.

The whole matter of amendment of the pleading is controlled by the court, so that the insertion of amendments if not numerous without rewriting the whole bill may be allowed.

Stating the Amendment.

If permitted to state the proposed amendments without filing a new pleading it may be stated as follows:

Title as in bill.

Now comes plaintiff and by leave of the court amends his bill (or answer) as follows: After the words, etc., on line of the page of the bill (or answer) insert, or that the allegation beginning on line, page of the bill (or answer) be so amended as to read as follows Or that the words on line page be stricken out.

R. F.,
Solicitor.

New rule 32 contemplates that the amendments sought after answer filed may be made as above stated without filing an entirely new pleading. By new rule No. 28 amendments made before answer filed, and after a copy of the bill has been taken from the clerk's office, no motion is necessary, but a copy of the "amended bill" must be served on the solicitor of the opposite party. So much of the old rule No. 28 permitting the amendments to be inserted in the bill to be served on the opposite party, as indicated above, has been omitted from new rule 28, and a copy of the whole bill as amended must be served unless by consent of parties, or order of the court, the proposed amendments may be served without rewriting the bill.

We see, then, a motion to amend, and the amended bill in the absence of consent of opposite counsel to permit the amendments proposed, must be served on the opposite party or his solicitor. (1st) When a copy of the bill has been taken out of the clerk's office and before answer. (2d) When an answer has been filed and the cause at issue. (3d) When the answer makes it necessary to amend the bill.

When Amendment to Be Filed.

After permission to amend has been granted the plaintiff to amend his bill, the amendments proposed, or the bill as amended attached to the motion, should be filed at once, or the amendments will be treated as abandoned, and the case will so proceed. While old equity rule 30, fixing the time within which an amendment was to be filed after permission to do so, has been omitted from the new rules, yet the purpose of the new rules is to expedite the preparation of the case for final hearing, and unreasonable delay will be penalized. See *Boston & A. R. Co. v. Parr*, 98 Fed. 484.

Amendment After Appeal.

A motion to amend a bill in the court of appeals so as to retain jurisdiction can only be made by consent. *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 464, 50 U. S. App. 280, 85 Fed. 869; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 617. But, as we have seen, the judgments may be reversed and amendment allowed in the court below without consent. *Ibid.*; *United States v. Hopewell*, 2 C. C. A. 510, 5 U. S. App. 137, 51 Fed. 798. Thus when a bill has been dismissed on demurrer for laches, the appellate court may send it back for amendment, showing excuse for delay. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 161. See act March 3d, 1915, permitting amendments after appeal to cure defective allegations of diversity of citizenship.

When an amendment is sought to be made after appeal, it will not be permitted if it requires new evidence. *American Bell Teleph. Co. v. United States*, 15 C. C. A. 569, 33 U. S. App. 236, 68 Fed. 570. The record must show the evidence to sustain the allegations sought to be made. *Ibid.*

We see now that under section 954, Comp. Stat. 1913, sec. 1591, amendments have been allowed at every stage of the case from the summons to the final judgment. *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 177. See "amendment to cure jurisdiction," chap. 59, p. 360, new rule 19. *McEldowney v. Card*, 193 Fed. 483, and cases cited; *Manitowoc Malting Co. v. Fuechtwanger*, 169 Fed. 986-988.

Not Affected by State Statutes.

The right to allow amendments in the Federal courts is not affected by State statutes (Mexican C. R. Co. v. Duthie, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; Oliver v. Raymond, 108 Fed. 927; Kent v. Bay State Gas Co. 93 Fed. 887), because Congress has legislated upon the subject. Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 987-988, and cases cited; Lange v. Union P. R. Co. 62 C. C. A. 48, 126 Fed. 339.

CHAPTER LX.

SUPPLEMENTAL BILL.

Old rule 57, providing the conditions under which a supplemental bill could be filed, has been substituted by new rule 34, as follows:

“Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his formal pleading, or of which he was ignorant when the original pleading was filed, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy, or a part thereof.

The following cases construing and applying old rule 57 indicate more or less a proper construction of new rule 34: Nevada Nickel Syndicate Co. v. National Nickel Co. 86 Fed. 489; Thompson v. Schenectady R. Co. 119 Fed. 638; Kennedy v. Bank of Georgia, 8 How. 610, 12 L. ed. 1218; Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co. 72 Fed. 325; Central Trust Co. v. Western North Carolina R. Co. 89 Fed. 24; Chester v. Life Asso. of America, 4 Fed. 489; Reeve v. North Carolina Land & Lumber Co. 72 C. C. A. 287, 141 Fed. 821-834; Curtis Davis & Co. v. Smith, 105 Fed. 949; Oregon & Transcontinental Co. v. Northern P. R. Co. 32 Fed. 428; Napier v. Westerhoff, 153 Fed. 985; Pittsburgh, S. & N. R. Co. v. Fiske, 101 C. C. A. 560, 178 Fed. 67, and cases cited; Bush v. Pioneer Min. Co. 102 C. C. A. 372, 179 Fed. 78.

The supplemental pleading is in the nature of an amendment, however it differs from the amended pleading in the fact that it does not take the place of the original pleading, but is an independent aid to it by adding some material fact occurring after the original pleading was filed, or which may have existed at the time, but was unknown to the pleader. Rule 34. Mellor

v. Smither, 52 C. C. A. 64, 114 Fed. 116; Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; Mitchell v. Big Six Development Co. 186 Fed. 556. It may be used as well after as before a decree. Ibid. The rule obviously means that any change of interest in the parties, or if a larger or different kind of relief is required by reason of events arising after the suit, then a supplemental bill is the proper proceeding to bring it before the court, and not by amendment; providing, always, that the complainant had a cause of action when the original bill was filed and it was set forth in the original bill. Mellor v. Smither, 52 C. C. A. 64, 114 Fed. 120; Chicago Grain Door Co. v. Chicago, B. & Q. R. Co. 137 Fed. 103, and cases cited; Banks Law Pub. Co. v. Lawyers' Co-op. Pub. Co. 139 Fed. 702; Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 754.

Supplemental Bill When Necessary.

Frequently after filing a suit, circumstances changing conditions, as a change of interest in parties, renders it necessary to bring in new parties, or perhaps some new fact had arisen affecting the subject-matter. This should be brought in by supplement, which is in effect a method of amendment. It is a continuation of the original bill, and adds to the former proceeding what is necessary for the court to enter a complete decree. Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 752; Napier v. Westerhoff, 153 Fed. 985; Lang v. Choctaw, O. & G. R. Co. 87 C. C. A. 307, 160 Fed. 356; Reeve v. North Carolina Land & Timber Co. 72 C. C. A. 287, 141 Fed. 821; Chapman v. Yellow Poplar Lumber Co. 74 C. C. A. 331, 143 Fed. 201; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; Electrical Accumulator Co. v. Brush Electric Co. 44 Fed. 606; Nevada Nickel Syndicate v. National Nickel Co. 86 Fed. 486; Pittsburgh, S. & N. R. Co. v. Fiske, 101 C. C. A. 560, 178 Fed. 67, 69, and cases cited. Thus any after acquired title should be brought in by supplement (Bush v. Pioneer Min. Co. 102 C. C. A. 372, 179 Fed. 78), or where the plaintiff has sued in another right, and his interest has determined by the appointment of a successor (Phipps v. Sedgwick, 95 U. S. 10, 24 L. ed. 594), such as a change of trustees,

or where there has been a partial transfer of interest by the original plaintiff, or by one of several original plaintiffs (Campbell v. New York, 35 Fed. 14); or where there happens to be one born with same class of interest as the parties to the bill; or when the husband and wife are parties, and by the death of one a new interest survives to the other; or where a party who is a *feme sole* marries during suit, a supplemental bill can be filed. Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co. 72 Fed. 327-329. But where the facts to be set up existed before suit and by reasonable diligence could have been discovered and pleaded by way of amendment, then a supplemental bill will not be allowed. Mosgrove v. Kountze, 4 McCrary, 561, 14 Fed. 315.

While the province, then, of a supplemental bill is to supply some defect in the structure of the original bill when this cannot be done by amendment, or to introduce matters occurring subsequent to the filing of the original bill, yet in the light of equity rules 19 and 28 and U. S. Rev. Stat. sec. 954 (Comp. Stat. 1913, sec. 1591), providing for amendments to bills at any progress of the cause, and the construction of courts permitting amendments at any stage, and in view of a further recognized rule of practice, that when the same end can be obtained by amendment, a supplemental bill will not lie (Henry v. Travelers' Ins. Co. 45 Fed. 302), it results that purely supplemental bills are only necessary in a few cases.

It is difficult under the various decisions to trace the line of demarcation where amendment ends and supplement begins; however, under equity rule 34 a supplemental bill is proper when the bill becomes defective (as when a new interest or right because of a change of interest in parties or of the subject-matter), requiring new facts to be alleged, which has accrued to one or all of the parties, after the bill has been filed, thereby creating a defect in the structure of the bill. Nevada Nickel Syndicate Co. v. National Nickel Co. 86 Fed. 489, and authorities cited at beginning of the chapter; Cedar Valley Land & Cattle Co. v. Coburn, 29 Fed. 586; New York Secur. & T. Co. v. Lincoln Street R. Co. 74 Fed. 68; Anglo-Florida Phosphate Co. v. McKibben, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529; De Forest v. Thompson, 40 Fed. 375; Maynard v. Green, 30 Fed. 644; Mosgrove v. Kountze, 4 McCrary, 561, 14 Fed. 315.

When No Cause in Original Bill.

If complainant has no ground for relief in the original bill, then you cannot file a supplemental; but if the original bill is sufficient for one kind of relief, and facts subsequently occur giving another kind of relief and more extensive, then it may be set up by supplement, but it is in the discretion of the court. *Henderson v. 300 Tons of Iron Ore*, 38 Fed. 40; *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 334; *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 116-120; *Putney v. Whitmore*, 66 Fed. 385; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791. When supplemental bill is permitted, you may set up matters that were omitted from the original bill. *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 116.

After Decree.

It may be stated as a rule that after decree a supplemental bill must be filed when you require some aid in the execution of the decree, or further directions, or where a purchaser of the subject-matter desires to obtain the benefit of the decree. *Secor v. Singleton*, 41 Fed. 725; *Root v. Woolworth*, 150 U. S. 402-411, 37 L. ed. 1124-1126, 14 Sup. Ct. Rep. 136; *French v. Hay* (*French v. Stewart*) 22 Wall. 246, 22 L. ed. 856; *Milwaukee R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 634, 17 L. ed. 895; *Mitchell v. Big Six Development Co.* 186 Fed. 557.

In *Root v. Woolworth*, 150 U. S. 402-411, 37 L. ed. 1124-1126, 14 Sup. Ct. Rep. 136, it is decided that when the title of the original party is determined, but another party becomes interested in the subject-matter through a title not derived from the original party, but in such manner as to render it just that this second party should have the benefit of the prior proceedings then such party can file a bill in the nature of a supplemental bill, to be discussed hereafter.

When one seeks to modify the decree, on the ground of newly discovered evidence, then a supplemental bill in the nature of a bill of review can be filed, but it must show definitely that the facts set up were not known prior to the entry of the de-

cree. *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 6; *Henry v. Travelers' Ins. Co.* 45 Fed. 299-303. Again, supplemental bills are proper to obtain restraining orders to protect decrees of courts, as where parties attempt to nullify in a State court a decree of a Federal court foreclosing a mortgage.

Motion to File Supplemental Bill.

Equity rule 34 further requires that before either character of supplemental bill can be filed, you must obtain consent of the court through a motion to file it, with reasonable notice to the other party showing proper cause. The motion is intended to advise the defendant of the ground upon which the bill is based, and to advise the court that probable cause exists for granting the motion, and that the matter embraced in the motion, if properly pleaded, would sustain the supplemental bill. The motion must show that the event upon which it is founded occurred after the filing of the bill (*Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 489); or if the fact existed before that, it was not known, or could not by reasonable diligence have been known (*Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 315; *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 6; *Henry v. Travelers' Ins. Co.* 45 Fed. 303), or through misapprehension, or some excusable cause, he was prevented from setting it up.

The following form is sufficient:

Title as in bill, and address.

The motion (or petition) of A. B. respectfully shows that on the day of.....A. D. 19... he filed his bill in this Honorable Court against C. D., defendant, for the purpose of (state object of bill) and plaintiff prayed in said bill as follows (state prayer of bill).

Plaintiff shows that the defendant appeared and answered (state substance of answer or so much as will show the relevancy of the supplement to be filed) or did not answer. That since the filing of the suit (here state what has occurred since upon which the supplement rests).

Wherefore your petitioner is advised that it is necessary to bring in C. H. as a party to the suit (or whatever is sought in the supplemental bill), and your petitioner prays that relief be granted to file a supplemental bill against C. H. for the purpose of making him a party and for such general and special relief as may be proper.

R. F.,
Solicitor.

Leave must be obtained to file (*Henry v. Travelers' Ins. Co.* 45 Fed. 303) and the motion may be filed at any stage of the cause (*Secor v. Singleton*, 41 Fed. 726); but the granting of it is entirely in the discretion of the court (*Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 614; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750).

In determining the motion, the court does not proceed to try the case on the motion, or determine questions that could be raised by demurrer to the bill, but will ordinarily grant the filing, though grave doubts may exist as to the relief prayed for. *Oregon & Transcontinental Co. v. Northern P. R. Co.* 32 Fed. 428.

Notice of Motion.

Equity rule 34 "provides that either party may, on reasonable notice, make an application to file and serve a supplemental pleading." The time of hearing the application as fixed in old rule 57 has been omitted in the new rule, but the presentation and hearing may be designated in the motion as upon any "motion day" fixed under rule 6, or any other day may be stated. The judge, at any time and place, and upon notice considered reasonable, may make any interlocutory order advancing the cause for hearing. Rule 6 and rule 1.

Title as in bill.

To Messrs....., Solicitors for Defendant, etc.:

You will please take notice that I will present to his Honor....., Judge of the District Court of the United States for the..... District of....., on the..... day of A. D. 19..., or as soon thereafter as practicable, a motion, a copy of which is hereto attached, praying for permission to file a supplemental bill (or a bill in the nature of a supplemental bill) in the above cause and upon the grounds therein stated.

R. F.,
Solicitor, etc.

This notice may be served by an officer or sent by a clerk, and it is usual for counsel to indorse acceptance of service, but if not, the officer serving may make his return of service as usual, or if served by one not an officer, he may make affidavit of the delivery to counsel on the notice as follows:

State of.....,

County of.....

On the.....day of....., A. D. 19..., I served the within notice on X. Y., solicitor of record for the defendant, by handing him a copy of (or leaving it at his place of business or residence).

(Signed) JOHN SMITH.

Sworn to before me S. M., a notary public in and for.....County, in the State of....., this the.....day of.....A. D. 19...

[SEAL.]

.....

Notary.

New equity rule 35 provides that it shall not be necessary to set forth in a supplemental bill any of the statements in the original bill, unless special circumstances require it. The supplemental bill as stated is only a continuation of the original suit, and it should set forth as much of the original pleadings as is necessary to clearly show the relevancy of the supplement, or the new matter sought to be introduced; that is, the change of interest of the parties and how the subject-matter is affected thereby.

Parties.

If a new party is made, then show his interest in the subject-matter and that he is entitled to a decree, and is further entitled to the benefit of the prior proceedings, or, if a defendant, that his presence is necessary to perfect the relief sought in the suit.

The parties to the bill depend on the purpose. Ordinarily the parties to the original bill are parties to the supplement, but when change of interest only occurs in one defendant, then a supplemental bill may be exhibited against him alone, and also when the purpose is only to make formal parties, then you need only make them parties to the supplemental bill.

In this character of bill, questions of citizenship do not affect jurisdiction, as it is only auxiliary to the principal suit. *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Miller v. Rogers*, 29 Fed. 401.

Process.

Again, if the matter of supplement does not require new

parties to be made, then there is no necessity for further process. *Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333. You may direct a rule to the parties already served to answer. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 329; but see *French v. Hay* (*French v. Stewart*) 22 Wall. 246, 247, 22 L. ed. 856, 857, holding new process necessary, unless waived.

CHAPTER LXI.

RELATION OF SUPPLEMENTAL TO ORIGINAL BILL.

The supplement is only a continuation of the original bill, and the facts set up must have a near relation to the original bill, and the relief sought must be a modification or enlargement of the original relief sought, *Maynard v. Green*, 30 Fed. 645. And the facts in the supplement must not contradict the facts in the original bill. (*Ibid.*; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 606), but must further the object (*Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333). If it has no connection with the original bill, it should be dismissed. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 6 Wall. 742, 18 L. ed. 856.

You cannot make new case by supplement (*Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607), or pray for relief manifestly inconsistent with original prayer. (*Ibid.*)

Again, if there is no cause of action in the original bill, it will not support a supplement stating a cause of action. *Putney v. Whitmire*, 66 Fed. 385.

If the supplemental bill be brought to set up new matter it must further appear that it was filed as soon as practicable after the discovery. *Henry v. Travelers' Ins. Co.* 45 Fed. 303; *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 1; *Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 315. A supplemental bill setting up documents *in hæc verba* will not be expunged if material. (*Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 488; but repetitions will be. (*Ibid.*)

Form of Supplemental Bill.

Title and address as in bill.

That on the.....day of....., A. D. 19..., plaintiff exhibited his original bill of complaint in this Honorable Court against C. D. defend-

ant (state purpose of bill and prayer). That said defendant was duly served with process and entered an appearance and put in his answer (here state the stage the case has reached). That on the.....day of....., A. D. 19..., C. D. was declared a bankrupt and that E. F. was chosen assignee of the estate of C. D., all of which has been duly conveyed and assigned to the said E. F., and plaintiff is advised that he is entitled to the same relief against the said E. F., as he would have been entitled to if C. D. had not become a bankrupt.

To the end, therefore, that the defendant E. F. may show why the plaintiff may not have the relief prayed for, and may answer under oath fully and truly to all the matters herein stated as if particularly interrogated thereto, and that the plaintiff may have the same relief against E. F. as he would have been entitled to against the said C. D. had he not become a bankrupt and that plaintiff may have such other further general and special relief as the facts of the case entitle him to, may it please Your Honor to grant to plaintiff a writ of subpoena directed to the said E. F., commanding to appear and make answer to the premises and abide by and perform such orders and decrees as to the court may seem proper.

Equity rule 35.

R. F.,
Solicitor.

The prayer of the bill may pray for a subpoena to the end that the defendant may answer the new supplemental matter, and the court to grant further relief based on the supplemental statements. Or if the defect arises from a change of parties a subpoena is prayed against the new parties to the end that they may answer the premises, and the plaintiff have the benefit of the former proceedings, and the same relief he would have been entitled to against the former parties.

The answer to the supplemental pleading should be filed within ten days after the supplemental pleading is filed, unless further time is allowed by the judge of the court; and upon default the like proceedings may be had as in case of an omission to put in an answer. Equity rules 32, 12, and 16. The defensive pleading would be governed by rules 29 and 30.

CHAPTER LXII.

BILL IN THE NATURE OF SUPPLEMENTAL BILL.

It will be noticed that old equity rule 57 provided not only for a supplemental bill, but for a bill in the nature of a supplemental bill "as may be necessary to be filed," which means, as the facts may demand. Judges of the Federal courts often spoke of the two classes of bills as if the distinction was only artificial, but there was a marked difference. *Curtis Davis & Co. v. Smith*, 105 Fed. 950; *Campbell v. New York*, 35 Fed. 14; *Vigneron v. Auto Time Saver Repair Kit Co.* 171 Fed. 581; *Ross v. Ft. Wayne*, 58 Fed. 404, reversed in 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466. New rule 34 omits the mention of bills in the nature of supplemental bills. Presumably the omission is because of new rule 19, providing that the court may at any time allow material supplemental matter to be set forth in an amended or supplemental pleading, while new rule 34 sets forth, as we have seen, the nature of the matter requiring a supplemental pleading, which in effect includes all matters heretofore set up by a "bill in the nature of a supplemental bill." So, under the present rules any supplementary matter set up in the pleading is only amendatory process to cure matters which render the original bill or answer defective, and is only a continuation of the original pleading so amended, while under the old rule it was held that a bill in the nature of a supplemental bill was in effect the beginning of a new suit, drawing to itself the advantage of the proceedings under the original bill. While then, under the new rules "a bill in the nature of a supplemental bill" need not, as such, be filed, yet the decisions under the old rule indicating the nature of the supplemental matter that should be set up in such a bill are still valuable, as they point out by illustration what is supplemental matter now controlled by new rules 34 and 19.

The decisions under old rule 57, discussing the supplemental

matter that should be set up by "a bill in the nature of a supplemental bill," are as follows: When the property which is the subject-matter of the suit has been entirely transferred by a sole plaintiff or sole defendant, or by all the plaintiffs or defendants, to a third person, or if the title has passed by death and transferred to another, then a bill in the nature of a supplemental bill should be filed (*Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 489; *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 325; *Secor v. Singleton*, 41 Fed. 725; *Walter Baker & Co. v. Baker*, 89 Fed. 673; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Miller v. Rogers*, 29 Fed. 401), because the parties in these cases are out of court for want of interest; the suit is virtually ended, and the court cannot enter a decree, nor can it be continued by revivor, or a pure supplemental bill for or against the new party. *Ibid.*

Again, suppose the interest is cut off by death, and the property in dispute transferred to a third person who does not hold in the same right as the deceased party; it cannot be continued by pure supplemental bill because he comes in by a different right and by a title that might be litigated, as, when property is cut off by bankruptcy. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 328; *Chester v. Life Asso. of America*, 4 Fed. 487; *Miller v. Rogers*, 29 Fed. 401. It would not be enough that the new party states that his assignor instituted suit and assigned to him, or that suit was instituted by the deceased and his interest arose by reason of the death, etc., as would be sufficient in a pure supplemental bill, but he must show that his assignor had the property, and the manner in which he had acquired the property carried with it the right to sue. *Foster*, Eq. Pr. sec. 190. This requires an original bill and supplementary only so far as advantage may be taken of the prior proceedings.

A bill in the nature of a supplemental bill must, however, follow the general purpose of the original bill and be in accord with the tenor of its allegations. *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607. It must set forth so much of the original bill or answer as shows how the interest of the original party has terminated, and the circumstances under which the new party can claim the benefit of the prior proceed-

ings, and it must show a cause of action against the original defendants, and be in form an original bill.

It has been held, however, that if a supplemental bill has been filed, when the remedy should have been sought through a bill in the nature of a supplemental bill, and no objection is raised to the irregularity, the court will disregard it and proceed on the supplemental bill. *Reedy v. Scott*, 23 Wall. 352, 23 L. ed. 109; see *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 196, 34 L. ed. 876, 11 Sup. Ct. Rep. 258.

Again, if a party defendant dies before appearance, or, having appeared, dies before answer, plea, or demurrer, and before a judgment *pro confesso* has been taken, his successor must be brought in by a bill in the nature of a supplemental bill. There is some confusion on the subject of making new parties when a purchase has been made *pendente lite*.

A distinction has been drawn where the plaintiff sells and where the defendant sells. Thus it is held that when the defendant sells, his purchaser is bound by the decree, and it is not necessary to file a supplemental bill; but when the plaintiff sells, there can be no decree, and the purchaser must be brought before the court by an original bill in the nature of a supplemental bill. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 329; *Walter Baker & Co. v. Baker*, 89 Fed. 675.

In *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 328, 329, the court recognizes the distinction between privies in law and privies in deed, and holds that if the new party obtains the interest by transfer he must file an original bill in the nature of a supplemental bill, but the interest of an administrator or heir at law may be set up by a pure supplemental bill.

CHAPTER LXIII.

MOTION TO REVIVE.

Under old rule 56 the revival of a suit abated by death or any other event was by a bill, and not by motion. *Dillard v. Central Virginia Iron Co.* 125 Fed. 158; *Simmons v. Morris*, 109 Fed. 707. But new rule No. 45 is substituted for old rule No. 56, and provides for the revival of a suit in equity by a simple motion in the event of the death of any of the parties. Where a party to the suit dies, representatives of the deceased should apply within a reasonable time by motion to be made parties to the suit; but on failure to do so any party to the suit may make the application, in which event the court must make the order for notice to the parties to be substituted and to file the necessary pleadings. The new rules dispense with bills of revivor.

By U. S. Rev. Stat. sec. 955, Comp. Stat. 1913, sec. 1592, it is provided that when either of the parties plaintiff or defendant die before final judgment the executor or administrator may, if the suit survives, prosecute or defend to final judgment If the executor or administrator refuses or neglects to become a party twenty days after being served by scire facias, the court may nevertheless render judgment against the deceased party. The executor or administrator becoming a party is entitled to a continuance. This section, however, has reference to a cause wherein a sole plaintiff or defendant dies. See *Allen v. Fairbanks*, 40 Fed. 188; *Spaeth v. Sells*, 176 Fed. 797. See also *Thomas v. Tensas Parish*, 14 Fed. 390, and note; *Spring v. Webb*, 227 Fed. 481.

By U. S. Rev. Stat. sec. 956, it is provided that when one of several plaintiffs or defendants die in an action which survives to or against the other, the writ or action shall not abate, but upon suggestion on the record the action shall proceed in favor of or against the surviving party

We thus see at a glance the rules of equity and Federal statutes controlling the revival of suits in Federal courts. There is nothing inconsistent in the equity rules and statutes; the former provides how the suggestion of death and subsequent revival is to be made, which must be followed in equity causes (*Fitzpatrick v. Domingo*, 4 Woods, 163, 14 Fed. 216), as section 955 does not apply to equity suits. *Brown v. Fletcher*, 140 Fed. 642.

Nature of the Motion.

Like the old bill of revivor, "the motion" is only an incident to the original suit. See *Hone v. Dillon*, 29 Fed. 465; *Newcombe v. Murray*, 77 Fed. 493; *Terry v. Sharon*, 131 U. S. 48, 33 L. ed. 96, 9 Sup. Ct. Rep. 705. To revive the suit the interest of the deceased must survive death, and must be of such a nature that it passes by operation of law to the legal representatives, or to the heirs at law of the deceased. If the interest is cut off by death or passed by will, it would fall within the conditions requiring a supplemental bill. *Chester v. Life Asso. of America*, 4 Fed. 489.

See new rule 35, controlling the drawing of the motion.

Parties.

The new rule requires the motion to be filed by the representatives of the deceased, and upon their failure to do so in a reasonable time, then any party to the record may make the motion. It is a matter of right where conditions exist, but not after an order dismissing the suit. *Fitzpatrick v. Domingo*, 4 Woods, 163, 14 Fed. 216; *Howth v. Owens*, 30 Fed. 911. New rule No. 45 requires notice where other parties than the legal representatives of the deceased seek to revive the suit.

When Sole Plaintiff Dies.

When the sole plaintiff dies, the executor or administrator must revive, or if there be no necessity for administration, then the heirs and all the defendants in the original bill must be made parties to the motion. *Kirk v. Du Bois*, 28 Fed. 460;

Childs v. Ferguson, 181 Fed. 795. See U. S. Rev. Stat. sec. 955, Comp. Stat. 1913, sec. 1592.

When Several Plaintiffs and One Dies.

If there be several plaintiffs, and one die, the suit may be revived by the representatives of the deceased party, or by one or all of the surviving plaintiffs. If any of the surviving plaintiffs refuse to join in the motion, make them defendants. See U. S. Rev. Stat. sec. 956 cited above and U. S. Rev. Stat. sec. 955; Spaeth v. Sells, 176 Fed. 797. Upon failure to make the application in a reasonable time, any other party to the suit may make the motion. Equity rule 45.

One of Several Defendants Dies.

When one of several defendants dies, the suit abates as to him, and you may proceed without him, unless he is an indispensable party, in which event the representative of the deceased must be made a party to the motion which may be filed by any one of the plaintiffs in the original bill, or by the representatives of the deceased party to be made a party, and in the event the application is not made in a reasonable time, any other party to the bill may make the motion.

Under old rule 56 it was held that the defendant could not make the plaintiff revive a suit, nor could he revive before decree, but he could demand the revival within a given time or have the suit dismissed, but under new rule 45, as we have seen, he can force the revival as stated above.

When one of several plaintiffs, or one of several defendants dies, and the interest of the deceased passes to the coplaintiffs or codefendants, then there is no necessity for a revival, as in cases where a husband joined with the wife *pro forma* dies, or where there are several executors or trustees, and one dies.

In making parties to the motion to revive, the fact that the new party or parties would destroy the diversity of citizenship would not affect the jurisdiction of the court if it existed when the suit was filed. Being only a continuation of the old suit, of which the court had jurisdiction, a subsequent change of situation cannot affect it. Clarke v. Mathewson, 12 Pet. 171, 9 L. ed. 1043; Hone v. Dillon, 29 Fed. 465.

You cannot object to the motion to revive the suit on account of the death of parties because the original pleading shows no cause of action or defense; the sole question is, Do the conditions exist provided by the rules for revival? *Allen v. Fairbanks*, 40 Fed. 188; *Mason v. Hartford, P. & F. R. Co.* 19 Fed. 53; *Fretz v. Stover*, 22 Wall. 198, 22 L. ed. 769. But if the court has no jurisdiction of the original bill, then a motion to dismiss the revivor would be good. *Sharon v. Terry*, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; *Rutledge v. Waldo*, 94 Fed. 265.

Motion to Revive When Filed by Any Other Party.

The motion to revive by "any of the parties" may be filed at any time during the progress of the cause when it becomes necessary, and either before or after the decree. *Terry v. Sharon*, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705. New rule No. 45. It must suggest the facts upon which the revival is sought as a basis for the notice to show cause. The court must make the order for notice to the parties to be substituted. This last clause of rule 45 applies to the motion made by "any other parties," where the representatives or successors of the deceased fail to make the application in a reasonable time after death.

Other Causes for Revival.

Old rule 56, providing for revival of the suit when abatement was caused by death, added "or any other event," which words were omitted in new rule 45, and we had these words construed as applying to abatements caused by marriages or when the circumstances show that the interest of the deceased party ceases at death, as when the deceased party was litigating a contingent interest; or when the interest of the deceased has been transferred by will to a third party; or in case where after death the interest of the deceased party would not pass to the administrator or heir; or where a sole party is suing in a representative capacity; or where the defendant dies before service or appearance; or where he dies after appearance, but before a decree *pro confesso*, but cases of this character clearly fall within new rule 34, requiring a supplemental bill to be filed.

What Must Be Alleged to Revive a Suit.

New rule 35 adopted the language of old rule 58 as follows: "It shall not be necessary in any 'bill of revivor' or supplemental bill to set forth any of the statements in the original suit unless the special circumstances require it." Bills of revivor as such, having been abolished by new rule 45, which requires only a simple motion, to substitute proper parties in the event of death of either of them, if new rule 35 has any application whatever, it must mean that in the motion to revive it is not necessary to set forth any of the statements in the original suit, unless special circumstances require it.

The motion to revive should simply set forth the pendency of the suit, the proceedings had, the cause of the abatement, and the proper parties to represent the deceased, when the motion is made by others than the representatives or successors of the deceased party. Equity rule 45.

Again, where the motion is filed by others than the representatives or successors of the deceased party, under rule 45, there must be a prayer for the necessary orders for notice to the parties sought to be substituted for the deceased party. If no objection is filed after service of the notice ordered by the court, the suit stands revived as of course; but an order should be entered of the fact upon which the suit proceeds. After the revival the suit has the benefit of all previous proceedings.

After the suit has abated, and before revival, no order can be taken, except such orders as may be necessary to the preservation of the property, or enforcing contempt for disobeying an injunction, or the performance of an act previously ordered by the court when all parties to the suit were before it.

Form of Motion.

I will now give the outlines of a motion to revive which may be perfected according to the circumstances of your case, and by observing the rules heretofore given:

Title and address as in original bill.

That A. B., late of....., but now deceased, on the.....day of....., A. D. 19..., exhibited his original bill of complaint in this court against C. D., defendant therein, stating (here state purpose of bill),

and praying (here state prayer of bill). That defendant C. D. was duly served with process, appeared and answered the bill (if such was fact).

That on the.....day of....., A. D. 19..., A. B. departed this life intestate (or having made his last will and testament naming therein L. N. as executor, who has duly qualified under said will), and G. H. was duly made administrator, and has taken out letters of administration as required by law. That the suit has become abated by the death of A. B. and the plaintiff is entitled to have the said proceedings revived against said defendants (naming them).

To the end, therefore, that the said defendants may show cause why the said suit and proceedings heretofore had may not stand revived, may it please the court to grant to the plaintiff a writ of subpœna to revive (and answer if death occurred before answer), directed to the said defendants (naming them), commanding them to appear before this court by the..... day of....., A. D. 19..., being the motion day in the month of....., then and there to show cause why the said suit should not be revived against him (or them), and to abide such further order as to the court may seem proper.

R. F.,
Solicitor.

Revival After Decree.

The motion may be made after decree (Terry v. Sharon, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; Shainwald v. Lewis, 69 Fed. 493, 494), and defendant may show court had no jurisdiction to enter the decree. (Rutledge v. Waldo, 94 Fed. 265.) Under rule 45.

CHAPTER LXIV.

DECREE PRO CONFESSO.

Having discussed the character of bills that a plaintiff may be called upon to file at various stages of the case in order to perfect it for hearing, and having discussed the process by which the defendants are brought into court to answer, I will now proceed to show the effect of a failure of defendant to respond to the subpoena by entering an appearance or pleading to the bill.

New rule 16 provides that it shall be the duty of the defendant, unless the time shall be enlarged, to file his answer or other defense to the bill in the clerk's office, twenty days from issuing the subpoena, as provided by new rule 12; otherwise the bill will be taken "*pro confesso*," as of course, upon the order of the plaintiff.

By new rule 17 when the bill is taken "*pro confesso*" the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the "*pro confesso*" order; and unless set aside at the same time, or the time is enlarged for filing an answer upon cause shown by *motion* and affidavit, the decree shall be deemed absolute (old rule 19 same): Third Nat. Bank v. Atlantic City, 65 C. C. A. 177, 130 Fed. 753, 754; Thomson v. Wooster, 114 U. S. 114, 29 L. ed. 108, 5 Sup. Ct. Rep. 788.

But no such *motion* to set aside the decree *pro confesso* shall be granted unless upon payment of the costs of the plaintiff up to that time, or such part thereof as the court may deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct for the purpose of speeding the cause. Rule 17.

When Pro Confesso Can Be Taken.

We thus see under these rules a decree *pro confesso* can be

taken upon failure to answer the bill as provided by rule 12 within the time prescribed, to wit, twenty days. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 576, 37 L. ed. 855, 13 Sup. Ct. Rep. 936; *Preston v. Finley*, 72 Fed. 853; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, 90 Fed. 598.

If the allegations of the bill will not support a decree *pro confesso* cannot be taken. *Wong Him v. Callahan*, 119 Fed. 381; *Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 377.

The conflict of opinion heretofore shown as to when the "decree nisi" should be entered under the old rules 12 and 18 is now set at rest by new rule No. 16 requiring the defendant to file his answer within the time required by new rule No. 12, in default of which, the rule nisi may be entered; rule days and appearance days having been abolished, there can be no longer any conflict as to whether the "rule nisi" can be entered on the first rule day of appearance or the succeeding rule day when the answer was to be filed.

But there are other stages of the cause when decrees *pro confesso* can be entered. By new rule No. 29 it is provided that every defense heretofore presentable by plea in bar or abatement shall be made in the answer, which may be separately heard and disposed of before the final trial; and if the defendant moves to dismiss the bill or any part thereof, the motion may be set down for hearing in five days, and if denied, answer to the bill must be filed in five days thereafter, or a decree *pro confesso* may be entered.

By new rule No. 31, upon failure to reply to a counterclaim set up in the answer a decree *pro confesso* may be entered. Again, by new rule No. 32, where an amendment to a bill after answer filed has been allowed, the defendant must in ten days thereafter put in a new or supplemental answer unless time is enlarged, and on default of which a decree *pro confesso* may be taken on the amended bill.

Old equity rule No. 34, providing that if upon hearing a demurrer or plea the defendant is assigned to answer further, and fails to do so, a decree *pro confesso* may be entered; and old rule 64, where exceptions to answer have been allowed, and

defendant is required to answer over, and fails to do so, a decree *pro confesso* may be allowed, are both abrogated by the new rules.

The decree can be taken against any one or more of several defendants. *Frow v. De La Vega*, 15 Wall. 554, 21 L. ed. 61; *Lockhart v. Horn*, 3 Woods, 548, Fed. Cas. No. 8,446.

Order to Take Bill As Confessed.

New equity rule 16 provides that the plaintiff may at his election enter an order (as of course) taking the bill as confessed. This order must be entered in the order book in the clerk's office, and you may use the following form:

Title as in bill.

The subpœna in the above entitled cause having been returned, which return has been filed, and it appearing therefrom that the said subpœna was duly served on C. D., the defendant herein, and no answer having been filed, which answer should have been filed on or before the.....day of, A. D. 19..., the same being the 20th day after the service of the subpœna excluding the day of service, therefore, on motion of R. F., solicitor for plaintiff, it is ordered and decreed that bill be taken as confessed as to the said C. D. defendant.

Date.....

The decree to be subsequently entered must follow the order and a proper basis for the *pro confesso* must be shown.

Equity rule 17 further provides that when the bill is taken as confessed, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*; and equity rule 16 provides that when the order is entered, the cause shall proceed *ex parte*, and the matter of the bill be decreed by the court at any time after thirty days, if proper to be decreed.

The following form for a decree *pro confesso* may be used:

Title as in bill.

It appearing to the court that the bill in the above cause was filed in this court on the.....day of, A. D. 19..., and that subpœna was duly issued and served on the defendant herein, and that no answer has been filed as required by rule 16 by the defendant C. D., and that an order taking the bill as confessed was duly entered in the order book on the.....day of, A. D. 19..., in the office of the clerk of this court,

and no proceeding has been taken by the defendant since the entry of said order, and more than thirty days have elapsed since entering the order *pro confesso*. It is hereby ordered, adjudged, and decreed (insert decree).

Serving Notice of the Decree.

The question has arisen whether notice of the decree should be served on defendant. In Thomson v. Wooster, 114 U. S. 114, 29 L. ed. 108, 5 Sup. Ct. Rep. 788, the court leaves it an open question, and in Austin v. Riley, 55 Fed. 833, the court calls attention to the fact that it is an open question, but seems to think it is not necessary.

Taking into consideration the English practice and the practice of the Federal courts prior to 1842, and the defects sought to be remedied by equity rules 16 and 17, I conclude that the words *ex parte* used in the rule, applied to proceedings after the bill is taken as confessed, were intended to cut off any further appearance of the defendant, or action on his part affecting the subject-matter of the bill, and notice of any character would therefore be an unjustifiable increase of costs. Austin v. Riley, 55 Fed. 833; Provident Life & T. Co. v. Camden & T. R. Co. 101 C. C. A. 68, 177 Fed. 854.

In Frow v. De La Vega, 15 Wall. 552, 21 L. ed. 60, the court construes *ex parte* to mean, that the defendant is not entitled to service of notice in the cause, nor to appear in it in any way. He can adduce no evidence nor be heard at the final hearing. Clason v. Morris, 10 Johns. 524.

In Romaine v. Union Ins. Co. 28 Fed. 632, the court says that now, instead of seeking to compel an appearance as under the old practice, the present rule prescribes a penalty for non-appearance by proceeding *ex parte* on the *pro confesso* decree.

Is Proof Necessary Before Entering Final Decree?

Closely connected with the *quære* above discussed is the question: Must you offer proof of the allegations of your bill before you can enter the final decree, and, if so, can the defendant then appear and rebut the proof?

If the allegations of the bill are sufficient to support the decree asked, the court will enter the final decree on the *pro-confesso* order without further proof (Ohio C. R. Co. v. Central.

Trust Co. 133 U. S. 91, 33 L. ed. 563, 10 Sup. Ct. Rep. 235); that is, if the allegations of the bill can be decreed without further discovery, the statements in the bill will be acted on as if true. (Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788.)

Effect of the Final Decree.

When a final decree is entered, which is warranted by the bill, it has the same effect as if the defendant had appeared and contested it (Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 756, 757, 31 L. ed. 313, 8 Sup. Ct. Rep. 337), and failure to enter an order *pro confesso* does not affect it. Allen v. New York, 18 Blatchf. 239, 7 Fed. 483; Linder v. Lewis, 1 Fed. 378.

Can Defendant offer Proof.

The decisions, as we have seen, clearly contemplate that if the bill is complete and the matter can be decreed without further discovery, such as an accounting, then the defendant cannot resist. But suppose a discovery or accounting is necessary to complete decree, or proof necessary to cure a defective allegation, such as uncertainty, can the defendant, as a matter of right, then appear and rebut plaintiff's proof before the court or master to whom it may be sent to state an account or ascertain some other fact necessary to a decree?

Under the English practice and the equity rule of 1822, controlling this matter, the defendant was permitted to appear before the master if the cause was submitted to him to take evidence, but these rules prior to 1842 did not contain the word *ex parte*. This *ex parte* clause of the rule of 1842 clearly cuts off the right of defendant to appear, and any interference by him between the order *pro confesso* and final decree. Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; Lockhart v. Horn, 3 Woods, 542, Fed. Cas. No. 8,446. He loses his standing in court. Frow v. De La Vega, 15 Wall. 554, 21 L. ed. 61. And permitting him to be heard would be a mere act of favor. Provident Life & T. Co. v. Camden & T. R. Co. 101 C. C. A. 68, 177 Fed. 854.

Final Decree Not Matter of Course.

While it may be said that defendant is closed out from any intervention or interference between the order *pro confesso* and final decree, yet it must not be understood that plaintiff is entitled to a final decree as a matter of course.

The rule requires the matter of the bill to be decreed by the court, and the practice is to set down the bill for *hearing* on the order *pro confesso*, and the matter of decree is then in the discretion of the court. *Andrews v. Cole*, 22 Blatchf. 184, 20 Fed. 410, 411. Where the defendant has appeared, but not answered, he can be heard on the form and extent of the decree. *Southern P. R. Co. v. Temple*, 59 Fed. 17; *Webster v. Oliver Ditson Co.* 171 Fed. 895.

Compelling to Answer.

The rights and procedure for compelling an answer by the defendant under certain conditions, given in old rule 18, have been entirely omitted in new rule 16, providing for a *pro confesso* decree in default of an answer. Discovery if thought necessary to enter a proper decree must be sought under new rule 58.

Rights of Defendant After Default.

The rights of defendant to further participate in the proceedings after he has failed to answer are as follows: Old equity rule 32, providing that after default but before the bill is taken as confessed, the defendant with leave of the court may file defensive pleading, has been omitted from the new rules; and new rule 16 is the only rule upon or affecting the practice in such cases, but there can be no objection to the old practice permitting the defendant to file an answer until the plaintiff has elected under rule 16 to take order that the bill be taken as confessed.

After the bill has been taken as confessed and before an absolute decree is entered, the defendant on motion showing cause may obtain leave of the court to answer or enlarge time for answering. (*French v. Hay* (*French v. Stewart*) 22 Wall. 238, 22 L. ed. 854; *Southern P. R. Co. v. Temple*, 59 Fed. 18; *United*

States v. Whitmire, 110 C. C. A. 222, 188 Fed. 422), but under new rule 17 the payment of costs, or such part thereof as may be deemed reasonable, and the undertaking by the defendant to file his answer within such time as the court may direct, or any other condition ordered by the court, are conditions precedent to granting the motion. New rule 17.

Third. By new equity rule 17 after the final decree has been entered, the defendant may at the *same term*, but not afterwards, appear by motion supported by affidavit showing cause, and have the decree set aside, or have the time extended to answer, but the payment of costs, or such part thereof as the court may require, and filing answer within such time as the court may fix, are conditions precedent. The matter is entirely within the discretion of the court. *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378; *Southern P. R. Co. v. Temple*, 59 Fed. 18.

Fourth. After the term in which the final decree has been entered, the court has no power to set aside the decree and reopen the case. New equity rules 17 and 69; *Stuart v. St. Paul*, 63 Fed. 644; *Linder v. Lewis*, 1 Fed. 378; *Cammeyer v. Durham House Drainage Co.* 35 Fed. 52; *Austin v. Riley*, 55 Fed. 833; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530; *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799; *Allen v. Wilson*, 21 Fed. 881. See "Vacating Decrees."

Under such conditions the only remedy left to the defendant is an appeal, and he will be confined to the issues that the averments of the bill do not support the decree. *Masterson v. Howard*, 18 Wall. 103, 21 L. ed. 765; *Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235; *Thomson v. Wooster*, 114 U. S. 104-120, 29 L. ed. 105-110, 5 Sup. Ct. Rep. 788.

Grounds for Setting Aside the Order or Decree Pro Confesso.

A decree against one joint defendant settles no right (*Lockhart v. Horn*, 3 Woods. 548, Fed. Cas. No. 8,446); he merely loses his standing in court (*Frow v. De La Vega*, 15 Wall. 552, 21 L. ed. 60). So when a decree *pro confesso* has been

taken against one of several joint defendants, and decided on the merits in favor of the other defendants, it sets aside the *pro confesso* decree. Ibid. See United States v. Whitmire, 110 C. C. A. 222, 188 Fed. 422 and new rule 19.

Again, when the order *pro confesso* has been entered on irregular service, it is good ground for setting it aside. Blythe v. Hinckley, 84 Fed. 228; Treadwell v. Cleveland, 3 McLean, 283, Fed. Cas. No. 14,155. So when the bill is fatally defective (Eldred v. American Palace Car. Co. 103 Fed. 209; Nelson v. Eaton, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376); or failure to file an answer by oversight of counsel (Schwartz v. Kennedy, 156 Fed. 317, 318; see also McFarland v. State Sav. Bank, 129 Fed. 244); or allegations insufficient (Wong Him v. Callahan, 119 Fed. 381; Eldred v. American Palace Car Co. 103 Fed. 209). So when the bill has been amended materially after service of process. Nelson v. Eaton, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378; Blythe v. Hinckley, 84 Fed. 244. So entry of order after service by publication if motion promptly made. American Freehold Land Mortg. Co. v. Thomas, 18 C. C. A. 327, 30 U. S. App. 690, 71 Fed. 782; Beach v. Mosgrove, 4 McCrary, 50, 16 Fed. 305. So when an answer has been stricken out on ground of contempt, it will not justify entering a decree *pro confesso*. Hovey v. Elliott, 167 U. S. 443, 42 L. ed. 229, 17 Sup. Ct. Rep. 841.

The discretion of the court is not hard to move when a meritorious defense is shown, and some excuse for not appearing within the time required by the rules. The motion, however, must be made promptly (Conly v. Buchanan, 81 Fed. 58), at the term in which the decree is entered. You cannot vacate at a subsequent term, as stated above, unless your motion was filed at the entry term, and went over without hearing, or continued by the court. Stuart v. St. Paul, 63 Fed. 644.

Form of Motion to Set Aside.

Title as in bill.

And now comes the defendant and moves the court to set aside the order (or decree) *pro confesso* entered on the.....day of....., A. D. 19..., and permit him to appear and plead for the following reasons to wit: (Here set out your reasons in full why you did not appear, and if

motion is supported by irregularity of service, or defects in bill, state them specifically, and if you wish to answer the bill, and try on merits, you should show meritorious defense.)

The motion must be supported by affidavit, unless based on grounds appearing of record.

The same form of motion applies to final decrees. Old equity rule 19, now new rule 17.

CHAPTER LXV.

DEFENSES.

The defendant, having been served with proper process and brought into court to answer, may by motion plead his privilege to be sued in the district of his residence, or any other ground upon which want of jurisdiction may appear, or any other matter of defense which may have heretofore been raised by plea or demurrer, or may answer directly to the merits of the bill.

By equity rule 12 a memorandum must be placed at the bottom of the subpoena requiring the defendant to file his answer or other defense on or before the twentieth day after service of the subpoena. By new rule 16 the answer is to be filed as required by rule 12, on default of which a decree *pro confesso* may be taken, as we have already seen.

Old rule 32, forbidding the defendant to plead, demur, and answer to the whole bill at the same time, is now abrogated. By new rule No. 29 demurrers and pleas are abolished, and every defense in point of law must, if arising on the face of the bill, whether for misjoinder, or nonjoinder, or insufficiency of fact, which heretofore may have been raised by demurrer or plea, now be raised by a motion to dismiss, or may be raised in the answer. *Hyams v. Old Dominion Co.* 204 Fed. 681; *Bogert v. Southern P. Co.* 211 Fed. 776; *Re Jones*, 209 Fed. 717; *Alexander v. Fidelity Trust Co.* 214 Fed. 495-496; *Fordham v. Hicks*, 224 Fed. 810.

Again, by this new rule every defense heretofore presentable by plea in bar or abatement shall now be made in the answer. By new rule No. 30 the defendant shall answer the merits of the bill in short and simple terms. We see, then, that by these new rules, Nos. 29 and 30, the defendant may by motion or in the answer raise any question of privilege, of jurisdiction, or of law, which might have been raised heretofore by plea or demurrer, and that all these defenses may be set up at the same

time and in the same paper answering to the merits. It is further seen that all defenses permitted to be set up by motion, if set up in the answer, may be separately heard before final hearing at the discretion of the court. Equity rule No. 29. And if the defenses by motion or in the answer are heard in advance of the trial and a dismissal of the bill is asked, the motion may be set down for hearing by either party upon five days' notice, and if denied, and a further answer is required, it must be filed in five days thereafter.

But the question arises whether under the new rules, filing an answer to the merits under rule No. 30 waives all defenses that may have been set up by plea or demurrer, as under the old rules. Without doubt the filing of an answer to the merits, as above stated, would waive any objection that could have been but was not raised, that would be dilatory, and not fundamental, in its nature; but filing these defenses at the same time with an answer to the merits would not, as under the old rules, be ground for striking out such defenses; in such cases answering to the merits does not admit the sufficiency of the bill if attacked by motion or in the answer, if such attack is made in due order of pleading. *Boyd v. New York & H. R. Co.* 220 Fed. 174. Though old rules Nos. 32 and 37 have been abrogated, yet it cannot be intended to abrogate the due order of pleading, though filed in one paper at the same time. New rule No. 29.

Again, under the new rules one may by motion set up a defense in point of law, or to a point of fact, to any part of the bill where such defenses have been heretofore set up by plea or demurrer, and may answer as to residue. Rule No. 29. Or he may raise all defenses heretofore permitted by plea or demurrer, to the whole bill, and answer the whole bill at the same time. See *Alexander v. Fidelity Trust Co.* 214 Fed. 495, same case 215 Fed. 791.

But the court may consider whether any of the legal objections can be heard or should be heard before taking testimony on the whole case, or by merely taking such evidence as was allowed formerly to support a plea. *Boyd v. New York & H. R. Co.* 220 Fed. 174. And a legal proposition going to less than the whole case should not be heard in advance, unless such issue would add to or eliminate testimony the presence or absence of which would not affect the presentation of other issues. *Id.*

Defenses Which May be Raised by Motion.

If scandalous or impertinent matter is apparent, it should be disposed of, as heretofore stated; after which the defendant should scan the bill with a view to determining:

- (a) Questions of jurisdiction.
- (b) A defect of parties, as misjoinder, or a want of necessary parties.
- (c) As to substance or form.
- (d) As to appearance of laches.

As to Jurisdiction.

I have already discussed territorial jurisdiction, or the right of a party to be sued in his residence district, and where there are divisions in the Federal district of his residence and citizenship, his right to be sued in the division of the district of his residence,—and how the right is asserted. I now will discuss other grounds of jurisdiction that must appear in the bill.

First. With this purpose in view you shall inquire if, as brought, it is obnoxious to section 723 of the United States Revised Statutes, forbidding the bringing of a suit in equity when there is an adequate remedy at law. If this is apparent, demurrer will lie. *Farley v. Kittson*, 120 U. S. 316, 30 L. ed. 689, 7 Sup. Ct. Rep. 534; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 764.

If the suit is one in equity, either as to subject-matter or the relief sought, you will then inquire:

Second. Is there proper diversity of citizenship, and is it shown by the bill as heretofore explained?

If the jurisdiction does not rest upon diversity of citizenship, you will then inquire:

Third. Is a Federal question stated; that is, does the right of recovery depend on a proper construction of the Constitution or laws of the United States or treaties made, etc., as before explained, and is the Federal question properly set out?

Fourth. Whatever be the basis of jurisdiction, you will next inquire if the proper amount is involved to give the court jurisdiction.

Fifth. Is the suit brought under any of the fundamental

heads of jurisdiction as contained in section 1, act of 1888, and, if so, is it properly alleged, so that jurisdiction appears both general and territorial?

Defect of Parties.

Assuming you are satisfied on the point of jurisdiction, you will next inquire as to parties. Are the parties to the bill proper parties, or does it appear that other parties should be made? Have the parties that have been made, capacity to sue, and, if so, are they suing in their proper capacity?

We have already seen that defect of parties is a good defense, unless under new equity rule 25, cl. 4, the bill shows good cause for not making them parties. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787. If the defect is apparent, you may set up by motion rule 29; but the motion must name the proper parties. See form, chap. 65. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51-57.

Sufficiency of Substance of Bill.

Being satisfied with the parties, you will next inquire into the substance of the bill.

(a) Is there any equity in the bill? *Farley v. Kittson*, 120 U. S. 316, 30 L. ed. 689, 7 Sup. Ct. Rep. 534; *Rhode Island v. Massachusetts*, 14 Pet. 210-258, 10 L. ed. 423-446.

(b) Does plaintiff show an interest, and, if so, is the defendant answerable?

(c) Does it appear that the defendant has, or claims an interest?

(d) Is the plaintiff entitled to the relief prayed for?

(e) Does the bill carry its own death wound by showing a defense?

(f) Does it appear that limitations, or the statute of frauds, or any other statute prevents relief?

(g) Does stale demand appear and not properly excused? *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 59; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 827; *Fuller v. Montague*, 8 C. C. A. 100, 16 U. S. App.

391, 59 Fed. 220; *Ulman v. Jaeger*, 67 Fed. 980; *Alexander v. Fidelity Trust Co.* 215 Fed. 794.

(h) Is the claim against public policy, or illegal?

The above constitute defenses to the bill, and, as said, when apparent may be met by motion in the nature of a demurrer under rule 29, which only changes the manner of raising the questions, but neither the issues nor the equitable principles upon which they rest are changed. *Alexander v. Fidelity Trust Co.* 215 Fed. 794.

Where your motion is in the nature of a demurrer to the whole bill, it cannot prevail if any relief whatever can be granted under the bill, however defective the allegations may be. *Edwards v. Bay State Gas Co.* 91 Fed. 946.

You will next examine the bill as to matter of form.

(a) The proper allegation of jurisdictional facts, though jurisdiction exists.

(b) Does plaintiff state positively facts within his knowledge?

(c) Are the allegations sufficiently certain? *Einstein v. Schnebly*, 89 Fed. 540; *Johnson v. Wilcox & G. Sewing Mach. Co.* 25 Fed. 373.

(d) Is the prayer for process properly stated?

(e) Is the bill signed by counsel?

(f) Is the bill one that should be verified, and, if so, is the affidavit in proper form?

These objections are, for the most part, formal, and easily amendable.

CHAPTER LXVI.

MOTIONS IN THE NATURE OF A DEMURRER.

New rule 29 abolishes demurrers, and now requires every point of law arising upon the face of the bill, as insufficiency of fact to constitute a cause of action in equity, to be raised by motion to dismiss the bill, or it may be raised in the answer, but, as before said, the rule only changes the manner of raising the issue, and not the allegations necessary to raising the issue of law, whether set up by motion, or in the answer. (See Motions.) The motion may be in the nature of a general demurrer applying the defects in the substance of the bill when clearly apparent, or in the nature of a special demurrer going to defective allegations or to parts of the bill defectively stated. This rule disposed of the old rules from 31 to 38 inclusive, covering the form, hearing, and proceedings after hearing, whether sustained or overruled. The rule applies to Bankrupt Courts. *Pollock v. Meyer Bros. Drug Co.* 233 Fed. 861.

Effect of a Motion to Dismiss Under Rule 29.

Motions in the nature of demurrers raise only the question of legal sufficiency as under the old rules it cannot recite facts, and must show distinctly the parts of the bill objected to. *Miller v. Rickey*, 123 Fed. 604; *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834; *Richardson v. Loree*, 36 C. C. A. 301, 94 Fed. 379; *Stewart v. Masterson*, 131 U. S. 151, 33 L. ed. 114, 9 Sup. Ct. Rep. 682; *Richardson v. Loree*, 36 C. C. A. 301, 49 Fed. 379; *O'Shaughnessy v. Humes*, 129 Fed. 960. A "speaking demurrer" is not allowed. *Star Ball Co. v. Klahn*, 145 Fed. 834. And it admits as true all allegations of the bill well pleaded, and in substance says that, admitting the facts to be true, the plaintiff cannot recover. *Kansas v. Colorado*, 185 U. S. 126, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Edison v. Thomas A. Edison, Jr., Chemical Co.* 128 Fed. 957; *Puget Sound Nat. Bank v. King County*, 57 Fed. 433; *Preston v.*

Smith, 26 Fed. 884; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 10, 38 L. ed. 59, 14 Sup. Ct. Rep. 240; *Chicot County v. Sherwood*, 148 U. S. 536, 37 L. ed. 549, 13 Sup. Ct. Rep. 695; *Dennison Co. v. Thomas Mfg. Co.* 94 Fed. 654. It does not admit conclusions of law (*Young v. Mercantile Trust Co.* 140 Fed. 61; *United States v. Ames*, 99 U. S. 35-45, 25 L. ed. 295-300; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 467; *Pennie v. Reis*, 132 U. S. 469, 33 L. ed. 428, 10 Sup. Ct. Rep. 149; *Cornell v. Green*, 43 Fed. 105; *Haynes v. Brewster*, 46 Fed. 473); as alleging simply the transaction was fraudulent (*Lumley v. Wabash R. Co.* 71 Fed. 28; *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476; *Patent Title Co. v. Stratton*, 95 Fed. 746; *Edison v. Thomas A. Edison, Jr., Chemical Co.* 128 Fed. 957; *Kittel v. Augusta T. & G. R. Co.* 65 Fed. 860). Nor matters of inference or argument. *Pullman Palace Car Co. v. Missouri P. R. Co.* 3 McCrary, 645, 11 Fed. 634. Nor does it admit constructions given in a bill to a statute. *Pennie v. Reis*, 132 U. S. 464-470, 33 L. ed. 426-429, 10 Sup. Ct. Rep. 149. Nor of a written instrument. *Gould v. Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 419; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 35 L. ed. 278, 11 Sup. Ct. Rep. 656; *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 676; *O'Shaughnessy v. Humes*, 129 Fed. 954. Nor any ascription of purpose not justified by acts. *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 676; *Taylor v. Holmes*, 14 Fed. 509. Nor that the design in a patent is new. *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.* 137 U. S. 445, 34 L. ed. 741, 11 Sup. Ct. Rep. 193; *Fordham v. Hicks*, 224 Fed. 810.

In *Boyd v. Nebraska*, 143 U. S. 180, 36 L. ed. 116, 12 Sup. Ct. Rep. 375, it was held that a demurrer admitted the allegation that a party was a naturalized citizen as alleged. In *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 1, it was held that, under a motion in the nature of a general demurrer, equitable estoppel may be assigned *ore tenus*, and whenever the bill alleges matter detrimental to the case it may be taken advantage of by a motion in the nature of a demurrer, as where laches appears in the bill. *Wollensak v. Reiher*, 115 U. S. 101, 29 L. ed. 351, 5 Sup. Ct.

Rep. 1137; *Hardt v. Heidweyer*, 152 U. S. 558, 38 L. ed. 552, 14 Sup. Ct. Rep. 671; *Alexander v. Fidelity Trust Co.* 215 Fed. 791; *Ralston Steel Car Co. v. National Dump Car Co.* 222 Fed. 590.

Form of Motion in the Nature of a Demurrer.

Title as in bill.

And now comes O. D. defendant in the above cause and moves the Court to dismiss the bill filed in this cause, because said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

Wherefore defendant prays the judgment of this court whether he shall further answer, and that he be dismissed with his costs.

R. F.,
Solicitor, etc.

These motions have the same flavor of the demurrer, by whatever name they may be called, and usually go to a want of equity in the bill; or to defects of substance when apparent; or to defective allegations; or to a part of the bill defectively stated; and should point out particularly the defects complained of. All facts well pleaded are admitted. *Stone v. Dugan Piano Co.* 136 C. C. A. 583, 220 Fed. 841. When the objection to the bill goes only to a part, such part should be set forth in the motion, and should be pointed out with such certainty, as to give specific information as to what part defendant would not be required to answer if the prayer of the motion be granted. *Miller v. Rickey*, 123 Fed. 604; *Ormsby v. Union P. R. Co.* 2 McCrary, 48, 4 Fed. 170; *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 18. Where you object to only a part of the bill, the other must be answered, or it will be taken as confessed.

By new rule No. 24 every pleading must be signed by one or more solicitors of record, and such signatures shall be considered as certificates by each solicitor that he has read the pleading signed by him, that according to his instruction there is good ground for the same; that no scandalous matter is inserted, and that it is not interposed for delay. So by the rule, formal certificates and affidavits are no longer required to motions, though in their nature demurrers.

Setting Down for Hearing.

Old equity rule No. 38, requiring the plaintiff to set down for hearing defenses set up by demurrer, has been abrogated, and now either party may set down the motion for hearing. By new rule No. 1 the judge in chambers, or in term, upon reasonable notice to the parties, may make and award any order not grantable of course, preparatory to hearing the case on its merits. By new rule No. 6, while the judge may appoint motion days for hearing these interlocutory motions, yet he may at any other time and place, upon such notice as he considers reasonable, make and direct all interlocutory orders for the advancement and conduct of the cause.

By equity rule 29 it is provided that if the defendant moves to dismiss the bill, or any part thereof, either by motion or answer, the motion may be set down for hearing by *either* party on five days' notice, and if the motion be denied the defendant must answer in five days thereafter, or the bill will be taken as confessed. (See Motions, end of chap. 52).

On hearing a motion in the nature of a demurrer to the bill, old rule No. 36 has been abrogated, and the authorities construing it no longer apply. When the answer is in its nature a demurrer to a part of the bill as well as to the whole bill, and the motion is only sustained as to a part of the bill, the proper order is to dismiss as much of the bill covered by the special objection and overrule as to the remainder, which must be answered. *Grant Powder Co. v. California Works*, 98 U. S. 140, 25 L. ed. 83. The court may refuse to decide the motion, or may leave the decision to the final hearing. *Snyder v. De Forest Wireless Teleg. Co.* 154 Fed. 142; *Rankin v. Miller*, 130 Fed. 229. In hearing these motions under rule 29 the allegations of the bill well pleaded are taken as true. *Destructor Co. v. Atlanta*, 219 Fed. 996; *Stone v. Dugan Piano Co.* 136 C. C. A. 583, 220 Fed. 841.

Again, in determining the motion, the bill and exhibits are taken together (*Continental Securities Co. v. Interborough Rapid Transit Co.* 165 Fed. 945; *Ulman v. Jaeger*, 67 Fed. 980); and if it appears that plaintiff is entitled to some kind of relief, even though the specific relief will not be granted, the motion will be overruled. *Edwards v. Bay State Gas Co.* 91

Fed. 946; *Berwind v. Canadian Co.* 98 Fed. 158; *Benedict v. Moore*, 76 Fed. 472; *Mercantile Trust & D. Co. v. Rhode Island Hospital Trust Co.* 36 Fed. 863; *United States v. Southern P. R. Co.* 40 Fed. 611; *Stewart v. Masterson*, 131 U. S. 158, 33 L. ed. 116, 9 Sup. Ct. Rep. 682. Or, to put the proposition in another form, the motion will be overruled unless it appears that under no possible state of the evidence a decree could be entered. *Failey v. Talbee*, 55 Fed. 892; *Maeder v. Buffalo Bill's Wild West Co.* 132 Fed. 280.

Allowing the Motion.

Whenever a motion is sustained, and there is probable ground that the pleading can be perfected by an amendment, the court will permit the amendment under such terms as may be just. New rule 19. U. S. Rev. Stat. sec. 954; U. S. Comp. Stat. 1901, p. 696; *Boston & A. R. Co. v. Parr*, 98 Fed. 483; *Edward P. Allis Co. v. Withlacoochee Lumber Co.* 44 C. C. A. 673, 105 Fed. 680. It is in the discretion of the court to permit the amendment, and is not a matter of right, for it is held that an order refusing an amendment will not be revised by the Supreme Court, unless you set forth in the record the amendment sought and there appears a clear abuse of discretion. *Ibid.*; *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 568, 25 L. ed. 815; *Dowell v. Applegate*, 7 Sawy. 232, 8 Fed. 698.

The judgment on a motion sustained is to dismiss the bill (*Fowler v. Osgood*, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 20-24), unless amendment allowed, but it is only an adjudication as to the exact point raised (*Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.* 121 Fed. 313-318; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214).

Overruling the Motion.

By rule 19 the court must, at any stage of the proceeding, disregard errors or defects not affecting the substantial rights of the parties. If the motion is overruled, the defendant will be assigned to answer (*Files v. Brown*, 59 C. C. A. 403, 124 Fed. 133), and if the defense falls within those mentioned in

rule No. 29, the answer must be filed in five days after the motion is denied; and upon failure to file such defense the bill may be taken as confessed. Otherwise, the judge may make such order as to the time of filing the answer as to him may seem best for the advancement of the case. New rule No. 6. Successive motions of this nature will not be allowed, and when overruled an answer is required at the next step. *Fuller v. Knapp*, 24 Fed. 100; *Victor Talking Mach. Co. v. Hoschke*, 169 Fed. 894. Where a motion of this nature has been filed, the record must show what has become of it, if not, it is presumed to have been abandoned. *Basey v. Gallagher*, 20 Wall. 679, 22 L. ed. 453, 1 Mor. Min. Rep. 683; *Southern R. Co. v. Rhodes*, 30 C. C. A. 157, 58 U. S. App. 349, 86 Fed. 424, 4 Am. Neg. Rep. 733.

CHAPTER LXVIa.

MOTION, OR ANSWER IN THE NATURE OF A PLEA.

We have seen under what conditions defenses in the nature of demurrers may be filed, when the legal objections appear on the face of the bill, but it may be that the same objections, touching jurisdiction, parties, and the substance of the bill may not be apparent on the face of the bill, but still be an existing fact; that is, the allegations as to these matters may not be true in fact, which, if shown, may abate the suit; or, it may be that facts connected with the subject-matter, jurisdiction, or parties are not alleged which if alleged would abate or destroy the equity of the bill which under the old rules were put in issue by a plea. Now the same defects may be met by an answer in the nature of a plea. Equity rule 29. By equity rule No. 29 pleas have been abolished, and every defense heretofore raised by plea must be made by motion, or it may be made in the answer, except, if the defense is in the nature of a plea in bar or abatement, it must be made in the answer, if the defect is not apparent on the face of the pleading; and, as we shall see hereafter, whether made by motion or in the answer, may be disposed of separately by hearing in advance of the final hearing at the discretion of the court.

The office of the answer in the nature of a plea is to present some distinct fact alleged which, if true, abates or bars the suit, and when going to the whole bill avoids the delay and expense of a trial of other issues tendered in the bill. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214; *Briggs v. Stroud*, 58 Fed. 717. To illustrate: Take a case to which the statute of frauds is an answer to the whole bill, as in an agreement to sell lands in parol. The advantage of the statute may be set

up by answer in the nature of a demurrer if the bill shows it was in parol, or by answer in the nature of a plea if the bill is silent or if it is alleged to be in writing, and the allegation is not true. The defense may be heard, in advance of the trial, to dismiss the bill, or may be heard at the final trial. Rule No. 29. *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534. Defenses of this nature create a single issue fatal to the bill, if proven. These defenses should pray for a dismissal of the bill. *United States v. California & O. Land Co.* 148 U. S. 31-49, 37 L. ed. 354-362, 13 Sup. Ct. Rep. 458.

Filing the Answer in the Nature of a Plea.

By new rules Nos. 12 and 16 the defendant is required to file his defenses twenty days from the service of the subpoena, excluding the day of service unless the time be enlarged by the court as provided by rule No. 16, in default of which an order as of course may be entered by the clerk upon application that the bill be taken as confessed.

Office of an Answer in the Nature of a Plea in Abatement.

Though pleas have been abolished, yet the defense, whether set up by motion or answer which is in its nature a plea should, for the sake of the certainty necessary in good pleading, clearly define the issue, contain all the elements of a good plea,—which shows specifically that the complainant has failed to allege a fact which should have been alleged and which if it had been alleged would have destroyed the equity of the bill. In a word, the old office of the plea and demurrer are not abrogated because as pleas and demurrers they are abolished. In filing these defenses there should be kept in mind the difference between the answer in the nature of a demurrer, and one in the nature of a plea. In the first the sufficiency of the bill in point of law is attacked, and in the second case it must appear that the bill should have inserted a fact which, if true, or the answer must deny a fact which, if proven, in either case would destroy the equity of the bill. *United States v. Peralta*, 99 Fed. 624; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688,

7 Sup. Ct. Rep. 534; Korn v. Wiebusch, 33 Fed. 50; Hubbell v. De Land, 11 Biss. 382, 14 Fed. 475.

An answer in the nature of a plea to abate the suit permanently should present the single issue which, if true, the bill need not be further answered (United States v. American Bell Teleph. Co. 30 Fed. 524; United States v. California & O. Land Co. 148 U. S. 31-49, 37 L. ed. 354-362, 13 Sup. Ct. Rep. 458).

Answers in Abatement.

Old rule No. 39, excepting matters of form, abatement, and character of parties from defenses to be set up by answer, is now abrogated, and these defenses, by equity rule No. 29, may be set up by motion or answer when apparent on the fact of the bill; but may be heard separately in advance of the final trial in the discretion of the court.

In matters purely dilatory in their nature, such as setting up venue, or the personal privilege of being sued in one's own district or residence; or for disability of parties of some character, such as infancy, or the capacity in which parties are suing or are being sued; or another suit pending, or any other defense of this character requiring something to be stricken out or added in order to get the issues of the case before the court for final hearing,—should be set up by answer, as rule 29 requires that all matter of defense in the nature of pleas in bar or abatement shall be made in the answer, but may be separately heard before the final hearing, in the discretion of the court.

You may set up by answer in abatement, bankruptcy, coverture, lunacy, or the nonexistence of the character and capacity in which parties are suing or being sued, such as partners, trustees, executors, administrators, or heirs, when not appearing in the face of the bill. You may set up by answer in abatement want of interest, or any other matter which would abate the suit, not appearing on the face of the bill. See Pittsburgh, S. & N. R. Co. v. Fiske, 101 C. C. A. 560, 178 Fed. 66-69 and cases cited; United States v. Gillespie, 6 Fed. 803; Sheffield & B. Coal, Iron & R. Co. v. Newman, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791; Marshall v. Otto, 59 Fed. 252. Forms for these pleas have already been given. You may set up by answer in abatement "another suit pending," however

your attention is called to the conditions under which the answer can be filed and sustained in the Federal court when the suit is pending in a State court. On the law side, the pendency of a suit in a State court does not abate a suit in the Federal court. *Burk v. McCaffrey*, 136 Fed. 696; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 282; *Mankato v. Barber Asphalt Paving Co.* 73 C. C. A. 439, 142 Fed. 329; *Bank of Commerce v. Stone*, 88 Fed. 398; *Ogden City v. Weaver*, 47 C. C. A. 485, 108 Fed. 568; *Defiance Water Co. v. Defiance*, 100 Fed. 178. On the equity side a case will not be dismissed though the plea be sustained, but if the suit is pending in a State equity court, the Federal court will suspend proceedings and await the result of the suit in the State court. *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *New York Cotton Exch. v. Hunt*, 144 Fed. 511; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 2; *Boatmen's Bank v. Fritzlen*, 135 Fed. 667; *Foley v. Hartley*, 72 Fed. 570; *Gamble v. San Diego*, 79 Fed. 487; *Hennessy v. Tacoma Smelting & Ref. Co.* 129 Fed. 40; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

The rules as above given apply only to suits that are of a personal character. When the suit affects the custody of property in the State court, the court first acquiring jurisdiction retains it, without interference from the other. *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 2; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 965; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 465, 113 Fed. 793; *Briggs v. Stroud*, 58 Fed. 720; *Ogden City v. Weaver*, 108 Fed. 568.

If you should set up in abatement a suit pending, the plea should show, first, same parties; second, same cause of action; third, whether the case is pending in law or equity; fourth, the same relief sought; fifth, the state of the pleadings in the other court. If not strictly within these rules, the plea should be overruled. *Griswold v. Bacheller*, 77 Fed. 857; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

Answers purely in abatement such as are set forth above,

would be waived by answer in bar, or setting up affirmative matter to abate permanently the suit, if not set up before the answer in bar. *Page v. Chillicothe*, 6 Fed. 602; *Briggs v. Stroud*, 58 Fed. 717; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 131, 35 L. ed. 661, 11 Sup. Ct. Rep. 982; *Central Trust Co. v. McGeorge*, 151 U. S. 133, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272.

Issues of this character should be disposed of at the earliest possible moment, and many districts have adopted local rules governing the practice of their respective districts, requiring all matters of pure abatement to be set up by preliminary answer in the nature of a plea, to which issue must be joined and the issue determined at once and before defendant is required to answer. *Marshall v. Otto*, 59 Fed. 252; *Livingston v. Story*, 11 Pet. 392, 9 L. ed. 763.

CHAPTER LXVII.

ANSWER IN THE NATURE OF A PLEA IN BAR.

Any single fact which if set up in the answer would destroy the equity of the bill and permanently abate the suit would be a plea in bar as designated under the old rules. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29. Thus, first, the statutes of frauds, or limitations, or other defense may be set up in bar of the equity. *McCloskey v. Barr*, 38 Fed. 166; *United States v. California & O. Land Co.* 148 U. S. 38, 39, 37 L. ed. 358, 13 Sup. Ct. Rep. 458. Second, laches in bringing suit. *Farrand v. Land & River Improv. Co.* 30 C. C. A. 128, 58 U. S. App. 559, 86 Fed. 393. Third, records, such as judgments and decrees, showing prior adjudication. *Mound City Co. v. Castleman*, 171 Fed. 521; *Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & P. Co.* 128 Fed. 751; *John D. Park & Sons Co. v. Bruen*, 133 Fed. 807; *Harrison v. Remington Paper Co.* 3 L.R.A. (N.S.) 954, 72 C. C. A. 405, 140 Fed. 386, 5 Ann. Cas. 314; *Fowler v. Stebbins*, 69 C. C. A. 209, 136 Fed. 365; *Montgomery v. McDermott*, 99 Fed. 502; *Desert King Min. Co. v. Wedekind*, 110 Fed. 873; *Nugent v. Philadelphia Traction Co.* 87 Fed. 251; *Moredock v. Moredock*, 179 Fed. 163; *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 380; *Smith v. Mosier*, 169 Fed. 431; *Lane v. Kuehn*, — Tex. Civ. App. —, 141 S. W. 365. Fourth, release agreements and awards. *Armengaud v. Coudert*, 23 Blatchf. 424, 27 Fed. 247. Fifth, title acquired by limitation. Sixth, title by will. Seventh, *bona fide* purchaser. *United States v. California & O. Land Co.* 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *United States v. Winona & St. P. R. Co.* 165 U. S. 479, 41 L. ed. 796, 17 Sup. Ct. Rep. 368. Eighth, collusive suit. *Dinsmore v. Central R. Co.* 19 Fed. 153; *McVeagh v. Denver City Waterworks Co.* 29 C. C. A. 33, 55 U. S. App. 267, 85 Fed. 74.

If you consider your plea an effective bar, such as limita-

tion or the statute of frauds, former adjudication, etc., reaching the very vitals of the cause of action upon which the bill is based, then by all means file the answer in the nature of a plea, for it reduces the issue to a single point and saves time and expense and proof at large. *Eveleth v. Southern California R. Co.* 123 Fed. 838; *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534; *Miller v. Rickey*, 123 Fed. 608. But if the result of your plea is doubtful, or it only goes to a part of the bill, and you have to answer to the other part, then let the plea alone and present your issues in answer to the whole bill and take the benefit of the entire defense. *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446; *Chisholm v. Johnson*, 84 Fed. 384.

Under new rule No. 29 you may set up in your answer all matters in bar that you could have heretofore insisted upon by plea; which means that you may rest your case on a single plea in bar, or as many others as in the opinion of counsel may be effective; and under new rule No. 30 the answer may state as many defenses in the alternative, whether consistent or not, as is deemed essential for the defense.

Of course the burden of proof is on the pleader where the issue is tried in advance of the final trial, but at the final trial the burden is on the complainant to establish his case before you are called upon to prove your plea, unless the court at the final trial orders the plea to be tried first before hearing on the issues of fact made by the answer to the whole bill.

Form of Answer in the Nature of a Plea in Bar.

Title as in bill.

In the United States District Court
for the District of.....

The answer of C. D. (or, the joint answer of C. D. and E. F., defendants) to the bill of complaint.

And now comes C. D. (or, defendants, etc.), and for answer to said bill (or, so much of said bill as seeks, etc., state part pleaded to substantially) and says (here insert matter in bar) all of which he alleges to be true, and pleads the same in bar, (or, in abatement) to the bill (or, so much as is plead to) and prays the judgment of the court whether he shall further answer said bill (or, the part pleaded to) and upon hearing said answer that this bill be dismissed and the defendant go hence with his costs in this behalf incurred.

R. F.,

Solicitor, for ———.

The Answer in the Nature of a Plea in Bar Must be Single.

While under rules Nos. 29 and 30 you may set up as many different defenses by answer as you may deem necessary, yet each defense in the nature of a plea in bar must be single in purpose; that is, contain but one defense (*Knox Rock-Blasting Co. v. Rairdon Stone Co.* 87 Fed. 968; *Miller v. Rickey*, 123 Fed. 604-607; *United States v. California & O. Land Co.* 148 U. S. 39, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *Jahn v. Champagne Lumber Co.* 152 Fed. 669; *Farley v. Kittson*, 120 U. S. 303-316, 30 L. ed. 684-689, 7 Sup. Ct. Rep. 534; *Hostetter Co. v. E. G. Lyons Co.* 99 Fed. 735; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 27; *Sims v. United States Wireless Teleg. Co.* 179 Fed. 540); by which is meant, a single answer containing matter in the nature of a plea in bar must not contain within itself two separate defenses, but a single well-defined issue. The objections to a double plea under the old rule should exist under the new, in the interest of good pleading so necessary to create definite issues (see authorities above and *Briggs v. Stroud*, 58 Fed. 718; *Gilbert v. Murphy*, 100 Fed. 161; *Fayerweather v. Hamilton College*, 103 Fed. 547-548). Thus, one should not set up in the same plea matters of law and fact (*Hostetter v. E. G. Lyon Co.* 99 Fed. 734); or the statute of limitations and no liability (*McCloskey v. Barr*, 38 Fed. 168. See also *Briggs v. Stroud*, 58 Fed. 717). But under the new rule you may set them up separately, either to the whole or separate parts of the bill. See authorities above. But they should be well-defined issues which can be separately determined. See also *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 200, 109 Fed. 506.

Averments in Answer in Nature of a Plea.

The averments must be clear, positive, and distinct. Whenever the defense sets up a single ground for barring or abating permanently the suit, the averment must present in itself a complete equitable defense. *McCloskey v. Barr*, 38 Fed. 165. The averment must be positive, not argumentative, facts, not legal conclusions. Thus, in ownership or fraud, facts showing ownership or fraud must be alleged. *Ibid.*; *Hostetter v. E. G.*

Lyon Co. 99 Fed. 735, 736; Chisholm v. Johnson, 84 Fed. 385; McCloskey v. Barr, 38 Fed. 166; McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 577; Computing Scale Co. v. Moore, 139 Fed. 197.

While it is said that a plea must be single, stating a single fact upon which the abatement or bar rests, yet it is not to be understood that you may not allege a variety of facts if they all tend to one clear ground of defense which may dispose of the bill. Vacuum Oil Co. v. Eagle Oil Co. 122 Fed. 105; Cooper v. Preston, 105 Fed. 403; Rhino v. Emery, 79 Fed. 483; Hazard v. Durant, 25 Fed. 26; Missouri P. R. Co. v. Texas & P. R. Co. 50 Fed. 151. To illustrate: If you wish to plead a release, you may set up all the facts inducing the release or by which it may be shown. McCloskey v. Barr, 38 Fed. 169.

So in averment of heirship in a bill, you may set up all the facts in a plea to meet the averment. Rhino v. Emery, 79 Fed. 483-485. So if you set up limitations by a plea, and the bill has sought to anticipate it by setting up disabilities, you may negative the disabilities in a plea. McCloskey v. Barr, 38 Fed. 166.

Again, if you set up the defense of a bona fide purchaser by plea, you must set up all the elements that constitute one a bona fide purchaser. Ibid. So if you plead the statute of frauds, you must set out the facts so that the court may see the application. Ibid. So in pleading *non compos*. Dudgeon v. Watson, 23 Blatchf. 131, 23 Fed. 161.

Again, in drawing your answer in the nature of a plea in bar of the suit, and you rest upon a single issue to destroy the equity of the bill, the allegations of the bill are taken as true, as in the case of a motion to dismiss in the nature of a demurrer, so if there is anything in the bill negating the fact that you intend setting up by the answer in the nature of a plea, you must negative all such allegations in the answer. Dwight v. Central Vermont R. Co. 20 Blatchf. 200, 9 Fed. 788; Goldsmith v. Gilliland, 10 Sawy. 606, 24 Fed. 154, 155; Hilton v. Guyott, 42 Fed. 250, 251; Rhino v. Emery, 79 Fed. 483; McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 577. You may file separate answers in the nature of pleas to separate parts of a bill, or a single plea to the whole bill, or you may file several distinct answers in the nature of pleas to the whole bill or any part thereof. Rule 30.

CHAPTER LXVIII.

SETTING DOWN THE ANSWER IN THE NATURE OF A PLEA FOR HEARING.

By equity rule No. 29, providing for defenses and how presented, all pleadings in abatement or bar, whether by motion to dismiss or in the answer, may be set down for hearing by either party in advance of final trial of the case on its merits *on five days' notice*, but this hearing and advance is entirely within the discretion of the court, as the court may defer the issue to the final trial. *Alexander v. Fidelity Trust Co.* 214 Fed. 497. Or the setting down for hearing may be ordered under rules 1 and 6 which are substantially as follows:

New equity rule No. 1 provides that the district courts are always open for the purpose of making and directing all interlocutory motions, orders, etc., preparatory to hearing the case on its merits and the judge may, on reasonable notice to the parties, make, direct, and award at chambers, in the clerk's office, and in vacation as well as in term time, all orders and proceedings not grantable of course.

By new rule No. 6 the judges must establish regular times and places not less than once in each month, when motions requiring notice and hearing may be made and disposed of. But the judge may at any other time and place than that established on the motions day, upon reasonable notice, make and direct all interlocutory orders, rules, and proceedings for the advancement or conduct of the cause.

Having thus grouped the new rules providing for hearing of all interlocutory motions and issues preliminary to the trial of the case on its merits, we see that either party may set down answers in the nature of pleas or interlocutory matter for hearing, thus abrogating all the old rules requiring the plaintiff alone to do so; and whether the defense in the nature of a plea be made by motion or answer, it may be taken up at any time,

at the discretion of the court, or it may be postponed until the final hearing. The penalty attached for not setting down defenses of this character for hearing under old rule No. 38 is not now enforced.

Effect of Setting Down an Answer in the Nature of a Plea for Hearing.

Formerly when a plea was set down for hearing, the issue of its sufficiency in law was only raised, and not an issue of fact. The issue of fact was raised only by the complainant's replication to the plea. But the old rule governing this practice having been abrogated, a motion or answer in the nature of a plea may be set down for hearing, first, on its sufficiency in law as a defense, second, on an issue wherein the truth of the motion or answer is challenged. If set down to try the legal sufficiency only, the allegations of the motion or answer are taken as true to determine its legal sufficiency; but if set down for hearing as to its truth, the allegations of the answer are denied without further pleading. New rule 31.

As to the effect of setting down an answer in the nature of a plea to test its sufficiency the following authorities are applicable: *American Sulphite Pulp Co. v. Babless Pulp & Paper Co.* 163 Fed. 845; *Burrell v. Hackley*, 35 Fed. 833; *Cook v. Sterling Electric Co.* 118 Fed. 45; *Metcalf v. American School Furniture Co.* 122 Fed. 115; *Schnauffer v. Aste*, 148 Fed. 867; *General Electric Co. v. New England Electric Mfg. Co.* 63 C. C. A. 448, 128 Fed. 738; *Raphael v. Trask*, 194 U. S. 276, 48 L. ed. 975, 24 Sup. Ct. Rep. 647; *Stephens v. Smartt*, 172 Fed. 466; *General Electric Co. v. Bullock Electric Mfg. Co.* 138 Fed. 412; *Farley v. Kittson*, 120 U. S. 303-314, 30 L. ed. 684-688, 7 Sup. Ct. Rep. 534; *Kellner v. Mutual L. Ins. Co.* 43 Fed. 626; *United States v. California & O. Land Co.* 148 U. S. 39, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *Gaines v. Rock Spring Distilling Co.* 179 Fed. 544; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 421; *Metcalf v. American School Furniture Co.* 122 Fed. 115; *Burrell v. Hackley*, 35 Fed. 833; *General Electric Co. v. New England Electric Mfg. Co.* 123 Fed. 310; s. c. 63 C. C. A. 448, 128 Fed. 739; *Rhode Island v. Massachusetts*, 14 Pet. 257-260, 10 L. ed. 445, 446.

Overruling for Insufficiency.

When upon the hearing the answer on the nature of a plea is overruled for insufficiency, the judgment is that the plea be disallowed, and the defendant has a right to answer over. New rule 29 allows five days to answer over, but this should be taken to apply only where the court does not fix the time. When the answer is determined against the defendant on an issue of fact interposed as a bar to the suit, if permitted to answer over, the same defense cannot be set up unless by special permission to renew it in the new answer (*Chisholm v. Johnson*, 84 Fed. 384); or the court, if the issue is tried in advance, may decline to act upon it, and let it stand over for the final trial (*Standard Distilling & Distributing Co. v. Woolsey*, 121 Fed. 1016; *Pentlarge v. Pentlarge*, 22 Fed. 412).

Sustaining the Legal Sufficiency of the Answer or Motion.

If the answer is sustained as sufficient in law, the truth of the plea becomes an issue for trial. *United States v. Dalles Military Road Co.* 140 U. S. 616, 617, 35 L. ed. 565, 566, 11 Sup. Ct. Rep. 988. Which issues of fact may be tried in advance on the trial of the case or at the final trial. *Pearce v. Rice*, 142 U. S. 42, 35 L. ed. 931, 12 Sup. Ct. Rep. 130; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 421; *Files v. Brown*, 59 C. C. A. 403, 124 Fed. 133; *Baltimore Trust & Guarantee Co. v. Hofstetter*, 29 C. C. A. 35, 56 U. S. App. 122, 85 Fed. 75; see *Gunning System v. Buffalo*, 157 Fed. 251, 252.

Where the plea as an issue of law meets all the allegations of the bill, which bars the suit, defendants are entitled to final decree. *W. A. Gaines & Co. v. Rock Spring Distilling Co.* 179 Fed. 544; *Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214. If the plea be good in part and bad in part the court will hold for trial the good part upon issues of fact, and will overrule the bad part, which shall not longer be an issue unless amendable and the amendment allowed. *Rhino v. Emory*, 79 Fed. 485, 486. Replications having been abolished, answers raising issues of fact will be considered denied for the purposes of trial. New rule No. 31.

When the Answer is Set Down for Hearing as an Issue of Fact.

Formerly, as stated above, the only way of putting a plea raising a question of fact in issue was by replication, which in effect admitted its validity if proved; but now by new rule No. 31 any defense is considered an issue without "replication," which has been abolished. New rule No. 31. If the answer in the nature of a plea as aforesaid is set down for trial on issues of fact, and the answer goes to the whole bill, and the facts are proven, its effect is to dismiss the bill. *Cottle v. Krementz*, 25 Fed. 494; *Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. ed. 445; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Westervelt v. Library Bureau*, 55 C. C. A. 436, 118 Fed. 825. But now setting down the answer for trial on issues of fact does not admit the validity of the plea, nor does the fact that the plea is proven necessarily dismiss the bill.

When the answer setting up an issue of fact in the nature of a plea to the bill to bar the suit or permanently to abate it, the only issue is the truth of the answer. *Eveleth v. Southern California R. Co.* 123 Fed. 836; *Farley v. Kittson*, 120 U. S. 315, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644; *Hartz v. Cleveland Block Co.* 37 C. C. A. 227, 95 Fed. 682; *Vacuum Oil Co. v. Eagle Oil Co.* 154 Fed. 867; *Birdseye v. Heilner*, 26 Fed. 147; *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

The burden is on the defendant (*Sharon v. Hill*, 10 Sawy. 666, 26 Fed. 723; *American Graphophone Co. v. Leeds & C. Co.* 140 Fed. 981); and strict proof must be made (*Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 218). You cannot prove less than what is alleged, or something different. *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458. You proceed with the proof in the same way as upon the trial of other issues of fact.

When the Answer in the Nature of a Plea is Proven.

When the answer sets up specific matter in the nature of a plea in bar, as before stated, and the issue is tried in advance
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of the final trial, and is proven (rule 29), and the plea goes to the whole bill, destroying its equity, the defendant is entitled to dismissal. *Eveleth v. Southern California R. Co.* 123 Fed. 838 and cases cited; *Horn v. Detroit Dry Dock Co.* 150 U. S. 610, 37 L. ed. 1199, 14 Sup. Ct. Rep. 214; *Earll v. Metropolitan Street R. Co.* 87 Fed. 528; *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 374; *Briggs v. Stroud*, 58 Fed. 720, 721; *Rejall v. Greenwood*, 35 C. C. A. 97, 92 Fed. 945. But if the answer setting up the special matter to bar the equity of the bill does not go to the whole bill, then the bill is not necessarily dismissed if the answer is proven, but in the further prosecution of the case will avail the defendant as far as in law and equity it should do so. *Pearce v. Rice*, 142 U. S. 28, 30 L. ed. 925, 12 Sup. Ct. Rep. 130; *American Graphophone Co. v. Edison Phonograph Works*, 68 Fed. 451, 452; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644; *Jones v. Hillis*, 100 Fed. 355; *Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 215; *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975; *Soderberg v. Armstrong*, 116 Fed. 710.

Under the old English rule, if the plaintiff replied to a plea in bar, and joined issue on the facts, he thereby admitted the sufficiency of the plea as an answer to his bill; and if the facts were proven in his bill was dismissed, though other equities were set up not put in issue, and which would have been sufficient to save the case from dismissal.

The ruling was absurdly technical, and enforced even when the allegations of the plea were not a proper defense. The theory was that joining issue on the plea was an admission that plaintiff staked his case on the falsity of the plea, and he must accept the consequence.

In the interest of common sense and the justice, the Federal courts very early departed from the English rule. *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975; *Edward P. Allis Co. v. Withlacoochee Lumber Co.* 44 C. C. A. 673, 105 Fed. 681, 682. The courts of the United States never did, in fact, adhere to the old rule. *Green v. Bogue*, 158 U. S. 478, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975.

When the answer is proven, the proper practice, as before said, is to dismiss the bill where the proven plea is an effectual

bar to the whole bill (see authorities above); but if the proven plea be not an entire defense to all the equities in the bill, that is, if there are allegations upon which an equity may rest, and which have not been met by the plea, and the plea only defeats a part of the bill, then the bill will be retained and the defendant ordered to answer. *Jones v. Hillis*, 100 Fed. 356; *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1068, 15 Sup. Ct. Rep. 975; *Pearce v. Rice*, 142 U. S. 41, 35 L. ed. 930, 12 Sup. Ct. Rep. 130; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534. There is nothing in the new rules obnoxious to the practice as above stated. Of course under new rules 19 and 28 the plaintiff may be permitted to so amend his bill as to avoid, if he can, the effect of the plea. See *Alexander v. Fidelity Trust Co.* 214 Fed. 497, where the issue was tried at the final hearing and allowance of amendment.

When the Answer in the Nature of a Plea is Not Proven.

By equity rule 29 it is provided that if the answer in the nature of a plea is denied, the defendant is given five days to file an answer to the bill, or a decree *pro confesso* may be taken, if he fails to do so, on the bill. *McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 146, 104 Fed. 709. The answer after the plea is overruled is an absolute right under this rule. *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446; *Westervelt v. Library Bureau*, 55 C. C. A. 436, 118 Fed. 824; *American Graphophone Co. v. Leeds & Co.* 140 Fed. 981; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644; *Files v. Brown*, 59 C. C. A. 403, 124 Fed. 133; *Underwood Typewriter Co. v. Manning*, 165 Fed. 451.

In *Sharon v. Hill*, 10 Sawy. 666, 26 Fed. 341, the defendant was not allowed to set up in his answer the issues determined against him in plea. *Pentlarge v. Pentlarge*, 22 Blatchf. 120, 22 Fed. 412; *Bean v. Clark*, 30 Fed. 225.

In *Kennedy v. Creswell*, 101 U. S. 641, 25 L. ed. 1075, Justice Bradley propounds the interrogatory, whether a defendant who pleads a false plea would be entitled to answer over. He intimates that when defendant has put the plaintiff to the necessity of trying the issue which is found against him, and the delay occasioned thereby, that defendant should not be allowed

to answer over, unless plaintiff demands it for further discovery. That finding the plea false, it should stand as an admission of the bill, and if true, the bill should be dismissed. Followed in *Eagle Oil Co. v. Vacuum Oil Co.* 89 C. C. A. 463, 162 Fed. 673; *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534.

In *Earll v. Metropolitan Street R. Co.* 87 Fed. 528, these two cases are reviewed and held not to conflict, but a finding against the plea in this case authorized a decree for plaintiff. *Eagle Oil Co. v. Vacuum Oil Co.* 89 C. C. A. 463, 162 Fed. 671. In *Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 215; *North Chicago Street R. Co. v. Chicago Union Traction Co.* 150 Fed. 629, 630; *Pearce v. Rice*, 142 U. S. 28, 30 L. ed. 925, 12 Sup. Ct. Rep. 130; *Soderberg v. Armstrong*, 116 Fed. 710.

CHAPTER LXIX.

THE ANSWER.

Framing the Answer.

By rule No. 29 every defense which heretofore could be raised by plea or demurrer may be set up in the answer or by a motion to dismiss, so that now all questions of law or fact may be incorporated in one pleading called the answer. *Boyd v. New York & H. R. Co.* 220 Fed. 174. By equity rule No. 30 the answer to allegations of the bill, as distinct from defenses set up formerly by plea or demurrer, is provided for as follows:

Rule 30. The defendant, in his answer, shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence, and avoiding any general denial of the averments of the bill. 2d. The defendant must specifically admit or deny or explain the facts upon which the plaintiff relies, unless he is without knowledge of such facts, in which case he must so state in his answer, which statement operates as a denial. All averments in the bill other than that of value or amount of damage shall be deemed confessed except as against an infant, a lunatic, or other person *non compos if not under guardianship*. 3d. The answer may be amended by leave of the court or judge, upon reasonable notice, so as to put any averment of the bill in issue when justice requires it. 4th. The answer may state as many defenses in the alternative, *regardless of consistency*, as the defendant deems essential to the defense. 5th. The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit. 6th. The defendant may set up in his answer without cross bill any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him; and such set-off or counterclaim so set up shall have the effect of a cross suit so as to enable

the court to pronounce a final judgment thereon both on the original and cross bill. *Harper Bros. v. Klaw*, 232 Fed. 609.

We see, then, the new rule requires, as formerly, a full and fair answer for each allegation of the bill forbidding all general denial. Each allegation must be either specially denied or admitted, or an explanation by confession or avoidance, or otherwise, must appear.

We see then under the rule each specific allegation of the bill must be answered, that is, answered as if each allegation was a direct interrogatory. You cannot allege generally in an answer that every fact in the bill not admitted is denied, but each specific allegation must be denied or admitted, or disposed of by some character of reply. *Brown v. Pierce*, 7 Wall. 211, 212, 19 L. ed. 135, 136; *Holton v. Guinn*, 65 Fed. 451; *People's United States Bank v. Gilson*, 88 C. C. A. 332, 161 Fed. 293. Plaintiff is entitled to see which of his allegations are admitted or denied (*McCloskey v. Barr*, 40 Fed. 559), so that the attention of the court may be directed to the debatable ground. But while specific answers are required, you must avoid great minutiae in detail; an answer that meets fairly the allegation is sufficient without detailing your evidence. *Field v. Hastings & B. Co.* 65 Fed. 279. The answers, if in the knowledge of the defendant, must be direct and positive; if he has no absolute knowledge, about the matter charged, he should so state. See *Victor G. Bloede Co. v. Carter*, 148 Fed. 127. New rule 30 cl. 1. *Coulston v. H. Franke Steel Range Co.* 221 Fed. 669.

Statements that a defendant has no knowledge, and neither denies nor admits the facts charged in the bill, does not admit their truth or relieve the plaintiff from proving them. *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Rogers v. Marshall*, 13 Fed. 64.

Under new rule 30 the assertion that one has no knowledge, etc., is equivalent to a denial, but one cannot say he has no knowledge of a matter of record, or of something he himself has done. Under this rule, again, all averments not answered specifically, other than of value and damages, shall be deemed confessed except as to infants, lunatics, and persons *non compos*, and not under guardianship.

Again, a defendant may plead all facts he has a right to prove. He may set them up in the alternative, regardless of consistency,

if he deems them essential to his defense. He may set up any counterclaim arising out of the transaction which is the subject-matter of the suit. He may without cross bill set out any set-off or counterclaim against the plaintiff which might be the subject-matter of an independent suit in equity against him. *Buffalo Specialty Co. v. Vancleff*, 217 Fed. 91.

Scandal and Impertinence.

The answer should be free from scandal and impertinence. However, it will not be suppressed if the allegations of the bill justified it. *United States v. McLaughlin*, 24 Fed. 826; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 379; *Whittemore v. Patten*, 84 Fed. 51; *Barrett v. Twin City Power Co.* 111 Fed. 45; *Pennsylvania Co. v. Bay*, 138 Fed. 206. However, the right to except to the answer for scandal and impertinence is not now permitted by new rule 21. The court may, on its own initiative or by simple motion, order redundant or scandalous matter to be stricken out upon such terms as he may see fit. An answer is impertinent when it appears that the matter alleged is not material, or relevant; or is stated with needless prolixity. *Whittemore v. Patten*, 84 Fed. 56. Or when not responsive to the bill. *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 667. Or when rambling and verbose. *Stokes v. Farnsworth*, 99 Fed. 838. And when sought to strike out for impertinence, it must be clearly made out. *Barrett v. Twin City Power Co.* 111 Fed. 45; see *Blanton v. Chalmers*, 158 Fed. 907. Impertinent allegations should not be permitted to be proved. *Gunnell v. Bird*, 10 Wall. 308, 19 L. ed. 915; *Pennsylvania Co. v. Bay*, 138 Fed. 206.

Inconsistent Matter.

Formerly the answer, having to be verified by the oath of the defendant, could not contain inconsistent matter, but by new rule No. 30 the answer may now contain as many defenses in the alternative consistent or inconsistent, as the defendant may deem essential to his defense, which of course cannot be alleged under oath. It is difficult to see how the permission, under this

rule, to file any number of inconsistent defenses, and thereby permit the pleading to assume the form of a written wrangle, will conduce either to clearness in the issue, or, by thus forcing the plaintiff to prepare to meet all kinds of inconsistent defenses at the final trial will tend to expedite the cause, or reduce the expense of the trial, which should have been a controlling factor in promulgating the new rules. This feature of new rule No. 30 seems to have been promulgated in the interest of the layman who wishes to defend his own cause, and perhaps in that point of view it may be a success.

When there are inconsistent, separate defenses, they cannot be offered in evidence to defeat each other, and thus virtually abolish the effect of the rule. See Cowen & Hill's notes to Phillipps on Evidence, vol. 1, pp. 209, 210; Bauman v. Chambers, 91 Tex. 111, 41 S. W. 471. But where there is inconsistency in the same plea the part most favorable to the plaintiff may be treated as an admission in his favor. Fowler v. Davenport, 21 Tex. 633, 634.

Affirmative Matter.

You, as a general rule, cannot expand the denial beyond the allegations in the bill (Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291); but you may set up affirmative matter, though not responsive, if it is a defense to the case made in the bill. Adams v. Bridgewater Iron Co. 6 Fed. 179; Pennsylvania Co. v. Bay, 138 Fed. 206; Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co. 43 Fed. 391; Stokes v. Farnsworth, 99 Fed. 837; Mound City Co. v. Castleman, 171 Fed. 520, and it may be of law as well as fact. Farmers' Loan & T. Co. v. Northern P. R. Co. 76 Fed. 15. An answer may be treated as a cross bill. Central Improvement Co. v. Cambria Steel Co. 127 C. C. A. 184, 210 Fed. 722.

When Answer Cures Bill.

Setting up in the answer material facts omitted in the bill cures the bill. Cavender v. Cavender, 114 U. S. 471, 29 L. ed. 214, 5 Sup. Ct. Rep. 955; Provisional Municipality v. Lehman, 6 C. C. A. 349, 13 U. S. App. 411, 57 Fed. 330; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 431.

Form of Answer.

Title as in bill.

The answer of C. D. (or, the joint and several answers of C. D. and E. F.) to the bill of complaint.

Now comes C. D., the defendant, and says for answer thereto: (here take up each allegation of the bill and answer it as if specially interrogated and state such defense as you have. You must either deny or admit the allegation or state that you have no knowledge but believe the allegations to be true or not true or that you have no knowledge or belief as to the allegation, etc.).

When each allegation has been responded to, then conclude the answer as follows: Having thus made a full answer to all the matters and things contained in the bill this defendant prays that the bill be dismissed and for judgment for his costs in this behalf incurred.

The prayer of the answer should be for a dismissal of the bill. *Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 27, or it may be treated as a cross bill and ask affirmative relief. *Central Improvement Co. v. Cambria Steel Co.* 127 C. C. A. 184, 210 Fed. 722.

And by rule No. 30, as seen, you can further set up in the answer any set-off or counterclaim either arising out of the subject-matter of the cause of action, or which might be the subject-matter of an independent bill against the plaintiff, and ask affirmative relief thereon.

Verifying the Answer.

The answer need not be sworn to as contemplated by old rule No. 59, which has been abrogated by new rule No. 36. This new rule refers only to pleadings which are required to be verified by these rules, or by statute, and provides, when the pleadings are required to be verified, before whom the verification must be made. As to the officers before whom the oath is to be taken, the new rule is substantially the same as old rule No. 59, except that masters in chancery and commissioners have been omitted from the new rule. New rule 78, permitting parties to affirm, is identically the same with old rule No. 91. By new rule No. 24 the signature of counsel to the pleadings is considered a certificate that there is good ground for the allegations to the pleading, and that they are not interposed for delay. The only pleading now required to be verified seems to be all bills where special relief is asked, pending the suit. Equity rules Nos. 25 and 73. Also by new rule No. 69 a petition for rehearing, and by new rule No. 27 bills filed by stockholders of a corporation. Other than these there seems to be no necessity for verification of pleadings under these rules.

When Need Not Answer Fully.

Old equity rule No. 39, creating an exception to answering fully the allegations of the bill, has been omitted from the new rules; but new rules Nos. 29 and 30, providing for all character of defenses to be set up by motion, or in answer, and for their submission to the court, which have already been discussed, are a substitute for old rule No. 39. By the new rule one may by motion, or in the answer, set up a "plea in bar" to the merits of the bill without answering the entire allegations of the bill. Thus, one who wishes to rest his defense on the plea of a bona fide purchaser may do so, and need not make further defense where the plea would be a bar to further prosecution of the suit (*Hatch v. Bancroft-Thompson Co.* 67 Fed. 805; *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29); or one may set up any number of pleas in bar going to the merits of the case without fully answering, where such pleas would bar the plaintiff's equity as was formerly the case under old rule No. 39. See *Standard Distilling & Distributing Co. v. Woolsey*, 121 Fed. 1017; *Holton v. Guinn*, 65 Fed. 450; *Von Schroder v. Brittan*, 98 Fed. 169; *Green v. Turner*, 30 C. C. A. 427, 49 U. S. App. 252, 86 Fed. 837. Where, however, the matter set up by motion or answer only seeks a temporary abatement of the suit, or goes merely to some irregularity in the form of the bill, then the bill should be answered as required under rule No. 30.

May Object to Parties in Answer.

You may object by answer or motion to want of parties, as this would be a bar to a decree in the case, if parties are indispensable. *Howth v. Owens*, 29 Fed. 725; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Carey v. Brown*, 92 U. S. 173, 23 L. ed. 470; *United States v. Gillespie*, 6 Fed. 803. New rule 43, which is identical with old rule 52, recognizes and permits this to be done, but it provides that *plaintiff* must in *fourteen days* after answer filed set down the cause for hearing on this issue alone. If the plaintiff neglects to do so, but proceeds with the cause to

hearing without noticing the objection, he will not be allowed as of course to amend his bill and cure defect, but the court may in its discretion permit it. If the parties are indispensable, the court may dismiss the bill. You see, equity rule 43 must be strictly pursued, or you will find your case hanging alone on the court's discretion.

By equity rule 44 the court may, on hearing the cause, when the defendant objects for the want of parties, not having taken the objection by motion or answer, and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties; but this rule clearly refers to only necessary parties or proper parties, whose interests are separable as heretofore shown, because if the absent parties are indispensable, the court cannot proceed. *Barney v. Baltimore*, 6 Wall. 284, 18 L. ed. 825. The court may, however, stop the case until indispensable parties are brought in, otherwise it must be dismissed. *Taylor v. Holmes*, 14 Fed. 515; *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 631, 20 L. ed. 84; *Collins Mfg. Co. v. Ferguson*, 54 Fed. 721; *Shields v. Barrow*, 17 How. 142, 15 L. ed. 161. (See "Parties.") In these cases the dismissal should be without prejudice. *Kendig v. Dean*, 97 U. S. 426, 24 L. ed. 1063; *Keith v. Clark*, 97 U. S. 456, 24 L. ed. 1072; *Goodman v. Niblack*, 102 U. S. 563, 26 L. ed. 232; *House v. Mullen*, 22 Wall. 47, 22 L. ed. 839.

This practice, provided by equity rule 43 for the disposal of the issue of the *want* of parties raised by the answer, is so speedy that one need not object to defect of parties by motion in the nature of a plea (*United States v. Gillespie*, 6 Fed. 803), but the answer must specify by name or description who the parties are. Equity rules 43 and 44.

CHAPTER LXX.

EFFECT OF ANSWER.

First. As a pleading.

Second. As evidence.

First, As a Pleading.

When it answers the merits of the whole bill, it waives all irregularities in all previous proceedings. *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 515; *Huntington v. Laidley*, 79 Fed. 865; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 383; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 329; *Marshall v. Otto*, 59 Fed. 249. Answering to the merits of the whole bill under new rule No. 30 waives all defenses that may have been set up formerly by plea or demurrer, where such defenses have not been set up previously by motion or in the answer or at the same time with the answer to the merits. The old rule that an answer waives all defenses set up at the same time with the answer to the merits (*Adams v. Howard*, 20 Blatchf. 38, 9 Fed. 347; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 511), is not now of force under the new rules, as all defenses may be set up at the same time and included in one answer. However, the defenses thus waived, as before stated, are only those of a dilatory nature, as venue, or matters of form, or any other matter that would temporarily abate the suit.

When there are two or more defendants, a motion or answer of one in the nature of a demurrer, or in the nature of a plea, as before explained, would not be affected by an answer to merits by any other defendant. *Dakin v. Union P. R. Co.* 5 Fed. 665.

Under new rule 31 the answer puts in issue the bill, and as no replication is now required, the allegations of the answer are put in issue by filing the same, even though it set up affirmative matter, except in cases of set-off or counterclaim. It puts plain-

tiff on proof if the allegations of his bill, but all averments, except of value, or amount of damages, in the bill, if not denied, need not be proven, unless the bill is brought against an infant, lunatic, or person *non compos*, not under guardianship.

This rule changes the general trend of decisions. Under the old rule that required proof of the allegations of the bill unless admitted, the burden did not shift except when the answer set up new matter or confession and avoidance, but under the new rule 30, allegations not denied by the answer are taken as confessed. As to the old rule, see *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 821, and authorities cited; *Whittemore v. Patten*, 81 Fed. 528.

The Answer as Evidence.

The answer, not being required to be sworn to, puts in issue the allegations of the bill, and is not evidence. The old rule that the sworn answer may be so used, and forcing upon the plaintiff a greater degree of proof to overcome its allegations, is no longer of force. So, though defenses are inconsistent, neither can be used as evidence. See *Line Steamers v. Robinson*, 134 C. C. A. 287, 218 Fed. 562, and cases cited. (See *Inconsistent Defenses*.) Admissions made in the answer, material to plaintiff's case, may be offered in evidence by the plaintiff. *Whittemore v. Patten*, *supra*. Rule 30; *Robinson v. Philadelphia & R. R. Co.* 28 Fed. 577; *Uhlmann v. Arnholt & S. Brewing Co.* 41 Fed. 369. However, admission by one defendant, when two or more, would not be evidence against a codefendant unless the interest was joint, or they are parties or privies in estate. *Earle v. Art Library Pub. Co.* 95 Fed. 544; *Clark v. Van Riensdyk*, 9 Cranch, 160, 3 L. ed. 690.

So the answer may be offered to show what averments of the bill are not denied and therefore confessed, under new rule 30.

New Matter in Answer; Effect.

New matter in answer must be proven by the defendant as original matter. *Allen v. O'Donald*, 28 Fed. 17; *Pennsylvania Co. v. Cole*, 132 Fed. 668; *McCoy v. Rhodes*, 11 How. 140, 141, 13 L. ed. 637, 638; *Roach v. Summers*, 20 Wall. 170,

22 L. ed. 253; *Seitz v. Mitchell*, 94 U. S. 582, 24 L. ed. 180. Rule 31.

Answer of Corporations.

The answer of corporations was never required to be under oath under the old rules. The corporation answers only under the corporate seal, *Continental Nat. Bank v. Heilman*, 66 Fed. 184, but, like an individual, must give all the information sought in the bill, and if ignorance is alleged without excuse, the court will be justified in charging it with the costs of the suit. *Colgate v. Campagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 83; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 197; *Gamewell Fire Alarm Teleg. Co. v. New York*, 31 Fed. 312.

Officers as Parties.

The joinder of officers who have taken part in the transactions about which the suit is brought is proper, although no decree against them personally can be entered, and if the corporation is dismissed from the suit for want of jurisdiction, or any other cause, no relief can be obtained against the officers (*Rowbotham v. George P. Steel Iron Co.* 71 Fed. 758), unless a joint liability exists, as when alleged misconduct be part of the purpose of the suit. *Morse v. Bay State Gas Co.* 91 Fed. 944; *Sidway v. Missouri Land & Live Stock Co.* 116 Fed. 386; *Geer v. Matthieson Alkali Works*, 190 U. S. 435, 47 L. ed. 1126, 23 Sup. Ct. Rep. 807. The answer of the corporation should be made by the principal officers, who should be able to admit or deny the allegations of the bill, or state want of knowledge clearly and truly. *Hale v. Continental Ins. Co.* 16 Fed. 718. For this purpose they should be made parties to the bill. *O'Brien v. Champlain Constr. Co.* 107 Fed. 338; *Continental Nat. Bank v. Heilman*, 66 Fed. 184. Answer is not evidence. *United States v. McLaughlin*, 24 Fed. 823.

Effect of Answer in Putting in Issue the Bill.

Old equity rule No. 41 is now abrogated, and new rule No. 31

provides that no replication shall be required but the cause shall be deemed at issue upon the filing of the answer. And the plaintiff must prove his case by a preponderance of the testimony. (*Stewart v. Allen*, 47 Fed. 400), and all the technical learning as to waiving or requiring the answer to be verified is now obsolete.

Affirmative Relief in Answer.

By equity rule No. 30 defendant in his answer may set up any counterclaim or set-off against the plaintiff that may have arisen out of the transaction, or that may have been the subject-matter of a suit in equity by cross bill against the plaintiff. Such set-off or counterclaim so set up shall have the effect of a cross bill upon which the court may give a final judgment as well as upon the original bill. *Harper Bros. v. Klaw*, 232 Fed. 609.

Under the former rule forbidding affirmative matter to be set up in the answer, it was generally held that it should have been set up by cross bill, but even under the old system the court may treat the answer as a cross bill, and grant affirmative relief where no objection was made. *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 221, 34 L. ed. 886, 11 Sup. Ct. Rep. 258; *Moran v. Hagerman*, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 500; *Book v. Justice Min. Co.* 58 Fed. 827.

Filing Answer and Procedure After.

By new rule No. 16, unless the time be extended the answer must be filed as required by new rule No. 12, to wit, within twenty days after service of the subpoena; but, as before said, the new rule No. 12, designating the time of filing the answer, applies to any other defense, whether it be of law or fact, which by rule No. 29 may be tried in advance of the trial on the merits, and if denied an answer must be filed five days thereafter, or *pro confesso* may be taken.

Testing Legal Sufficiency of the Answer.

The test of the legal sufficiency of the answer by setting down the case for hearing on bill and answer is not provided for under

the new rules. New rule No. 33 provides that if an answer sets up an affirmative defense the plaintiff may on five days' notice, or such time as the court may allow, test the sufficiency of the answer by motion to strike out, and if found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter. But this procedure applies where the answer sets up an affirmative defense, set-off, or counterclaim, but does not provide for attacking the insufficiency of the answer as where evasive, to the allegations of the bill, which heretofore were met by exceptions to the answer, which by the new rules have been abolished.

The test of the sufficiency of the answer, as provided under new rule No. 33, may be made on any motion day or in chambers or on any other day appointed, and if amendable the court may allow the amendment, or strike out. Where the motion is to strike out the answer, and for final judgment on the prayer of the bill because of the insufficiency of the answer as a matter of law to defeat the bill, the motion ought to be heard in term time in open court, when a final decree may be entered. *Campbell Printing-Press & Mfg. Co. v. Manhattan Elev. R. Co.* 48 Fed. 344; *Church Ward International Steel Co. v. Bethlehem Steel Co.* 233 Fed. 322.

I take it that the provision made by rule No. 33 refers more to its legal sufficiency as a pleading, than objection to the answer as a response to the allegations of the bill. Motions which raise no question of law, but go simply to objection to the answer because irresponsive, evasive, or irrelevant, which under the old rules were met by exception (*Stokes v. Farnsworth*, 99 Fed. 836; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576); or when argumentative; or impertinent, would now be a useless waste of time for many reasons. First, the answer is not now required to be sworn to, and cannot be used as evidence except as to admissions therein; second, allegations of the bill not specifically denied or explained are admitted. (Rule No. 30); third, discovery is no longer necessary through interrogatories in the bill, as parties may be examined orally, or by deposition, and thus be made to answer definitely the allegations. (*United States v. McLaughlin*, 24 Fed. 825; *Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 1204; *Field v. Hastings & B. Co.* 65 Fed. 279.) The reason of the rule has ceased.

But while there is now no necessity to meet objections to an-

swers for evasiveness, or shuffling to avoid specific answers, yet a motion to strike out such answers to allegations of the bill may be made and heard by the court at his discretion. *Peacock v. United States*, 60 C. C. A. 389, 125 Fed. 586. Of course the complainant is entitled to an explicit answer to every material allegation of the bill. He has a right to know what is admitted, and what denied, and what he must prove; and there is no reason why the court may not permit it to be accomplished by a motion to strike out. See *Marconi Wireless Teleg. Co. v. National Electric Signaling Co.* 206 Fed. 295, and *Sydney v. Mugford Printing & Engraving Co.* 214 Fed. 841, where motion to strike out counterclaim allowed.

*Form of Motion to Strike Out Allegations of Answer.**

Title as in bill.

And now comes the plaintiff A. B. and moves the court to strike out the answer to clause 1 of the bill (or whatever clause it may be) charging, etc., because—

First. It is evasive and not responsive.

Second. It is scandalous and impertinent.

Third. It is imperfect and insufficient and plaintiff prays, that it be stricken out and taken for naught.

R. F.,
Solicitor.

Of course it may be amended if stricken out, but if not amended, the allegation of the bill will be taken as confessed, under rule 30.

Your motion should set forth the charges in the bill, and the answers as made that are excepted to, and showing in what the insufficiency consists, or that it is obnoxious to the objection made. *Schultz v. Phenix Ins. Co.* 77 Fed. 376; *Fuller v. Knapp*, 24 Fed. 100; *Whittemore v. Patten*, 84 Fed. 53; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* 43 Fed. 391; *Blanton v. Chalmers*, 158 Fed. 907. An answer is impertinent and liable to exception when it is apparent that the matter set up is not material or relevant, or is stated with needless prolixity. *Pennsylvania Co. v. Bay*, 138 Fed. 206; *Greene v. Aurora Co.* 158 Fed. 908. So when the allegations of the bill are immaterial, exceptions will not lie, because they are not answered. *Hardeman v. Harris*, 7 How. 728, 729, 12 L. ed. 889, 890; *Peters v. Tonopah Min. Co.* 120 Fed. 587. A liberal
S. Eq.—28.

construction is given to the answer when excepted to. Ibid. And if the paragraph of the answer excepted to is partly good, an exception to the whole will not lie. Board of Trade v. National Bd. of Trade, 154 Fed. 238. See Dr. Miles Medical Co. v. Snellenburg, 152 Fed. 662.

New matter, whether responsive to the allegations of the bill, or not, may be set up in the answer under the new rule, and whether intended as a defense or for affirmative relief, cannot now be objected to because irresponsible to the bill. New rule No. 30. See Board of Trade v. National Bd. of Trade, 154 Fed. 238, where objections to the answer are partly good.

Scandal and Impertinence in Answer.

By equity rule No. 21 exception for scandal or impertinence in answer is abolished, but the court may, on motion or its own initiative, order any redundant, imperinent, or scandalous matter in the answer to be stricken out upon such terms as the court may direct. Where the bill justifies the answer charged as scandalous, etc., the motion should not be sustained. Equity rule 21; Comstock v. Herron, 45 Fed. 660. An answer is impertinent when the matter set up is not material or relevant or stated with needless prolixity. Pennsylvania Co. v. Bay, 138 Fed. 206; Greene v. Aurora R. Co. 158 Fed. 909. This last objection is not favored because if the matter set up might be material the objection should not be sustained; for it struck out and it should afterwards appear material on the final trial, it could not be remedied. Again, when new matter is set up in the answer, though it be not responsive to any allegation of the bill, yet if it sets up a substantial defense it cannot be objected to because irresponsible. Again, where the allegations to the bill are immaterial they cannot be objected to though not answered. Peters v. Tonopah Min. Co. 120 Fed. 587.

When Motion Must Be Filed.

A motion raising the question of the insufficiency of the answer, if desired to be done, may be filed at any time within the provision of rule No. 1, and may be heard on any motion day or any other time as provided by rule No. 6. If the answer set up an affirmative defense or counterclaim, and objection be

made, the plaintiff, on five days' notice, unless the time be enlarged, may test the sufficiency of the answer by motion to strike out. See also new rule No. 33.

When Motion is Sustained.

Where the motion is sustained the defendant will be ruled for a better answer. If the motion goes to the whole answer, and none is filed within the time required by the court the bill may be taken as confessed. If the objection goes only to certain phases of the answer, and is sustained, further answer should be filed. If not filed within the time required, the allegations of the bill, if material, to which the defective answer is intended as a reply, will be considered as confessed.

When Motion Overruled.

When the answer is held sufficient as a response to the bill it puts in issue at once the allegations of the bill. New rule No. 31. The answers of corporations are controlled by the same rule. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Whittemore v. Patten*, 81 Fed. 528.

CHAPTER LXXI.

AMENDING ANSWER.

We have seen by new rule No. 33, that when the answer was attacked for insufficiency, and held insufficient, the court may allow it to be amended, if amendable, on such terms as it may order. By rule No. 30 the answer may be amended by leave of the court or judge upon reasonable notice, so as to put any averments in issue when justice requires it. The rules contemplate that an amendment to the answer must be made by the court, or judge, and are not grantable of course. By new rule No. 20 a further and more particular statement of the nature of the defense may be ordered by the court on terms. See *Gubbins v. Laughtenschlager*, 75 Fed. 615 and *Bass v. Christian Feigen-span*, 82 Fed. 260.

The motion to amend may, by new rule No. 19, be made at any time and upon such terms as may be just, and the amendment may extend to any material supplemental matter that may be set forth in an amended or supplemental pleading; and it seems that this amendment may be ordered at the discretion of the court at any stage of the proceedings when it would not conflict with the substantial rights of the parties. See sections 754 and 954, U. S. Rev. Stat. Comp. Stat. 1913, secs. 1282, 1591. Of course the answer may be amended by consent. *Stokes v. Farnsworth*, 99 Fed. 836.

By new equity rule No. 32 when the bill has been amended after answer filed, the defendant must file a new or supplemental answer. *Perkins v. Hendryx*, 31 Fed. 522. This rule is the same as old rule No. 46, except that when the amendment to the bill is filed the defendant must file a new or supplemental answer within ten days thereafter, unless the time is enlarged or otherwise ordered by the judge of the court; and upon default a decree *pro confesso* may be taken.

Thus having grouped the rules affecting the amendment of

answers, we see, as before stated, no material amendments can be allowed except upon motion and upon application to the court. The motion may be as follows:

Title as in bill.

And now comes the defendant in the above and entitled cause and moves the court for leave to amend his answer as will appear in the amended answer herewith filed. That said amendments are material and necessary to a proper defense of the case; that the matter as amended and the amendments offered were not known prior to filing the original answer (or, if known, show that they were inadvertently or through mistake not incorporated in the original answer or that the materiality has arisen since). Wherefore he prays that said amendments be allowed and considered a part of the answer upon the hearing of this cause.

R. F.
Solicitor.

While under new rule No. 30 it is said that the court may allow any amendment to the answer to put in issue any averment in the bill when justice requires it, yet, giving a liberal construction to the rule, the defendant may set up any counterclaim against the plaintiff by amendment which might be the subject of an independent suit in equity against the plaintiff.

Notice of the Motion.

Equity rule No. 30 requires reasonable notice of the motion to be given to the other party, the reasonableness of which must be determined by the court if objection is taken.

To A. B., Plaintiff, or E. S., his Counsel of Record:

Please take notice that I have filed a motion for leave to amend the answer heretofore filed by the defendant in this cause, a copy of which motion containing the amendments sought is hereto attached for your information.

I will present said motion on the.....day of....., A. D. 19..., or as soon thereafter as practicable, to his Honor, judge, etc., at.....

R. F.
Solicitor.

You may file the motion and attach a copy of the amendments sought both to the motion and notice. *Ibid.*; *Stokes v. Farnsworth*, 99 Fed. 837.

If the order to amend is granted by the court, prepare it as follows:

Title as in bill.

This cause coming on to be heard in chambers (or in open court) on the motion of defendant to amend his answer, and both parties having appeared (or it appearing that notice was served on plaintiff and he came not), and the court being fully advised of the amendments sought to be made to the answer of defendant heretofore filed in this cause on the.....day of, A. D. 19..., it is hereby ordered, adjudged, and decreed that the motion be granted and that the amendments as set forth in the motion be allowed and the clerk of the court is hereby ordered to file the same as of the date of this order as amendments to the original answer.

Judge, etc.

This and all other forms given are mere general directions in the successive steps of a suit in equity, which you may use or improve upon, as you deem best.

The order will be entered by the clerk as a part of the proceedings, and the amendments will be filed by him as a pleading in the cause.

The distinction heretofore existing as between allowing amendments to bills and allowing them to answers, because of the fact that the answer had to be sworn to, no longer obtains, and the reason for amendment in one case need not be more cogent than satisfactory than in the other.

But in allowing amendments to answers when the facts sought to be set up by amendment were known to the defendant when the answer was filed, the court should hesitate before permitting the litigant to experiment with the court's discretion (*Gubbins v. Laughtenschlager*, 75 Fed. 624; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; *Cross v. Morgan*, 6 Fed. 244, 245. See new rule 34), especially if the amendment sought to be set up would affect substantial rights (rule 19).

When Amendment Conflicts with Other Allegations.

Under the former rules an amendment that conflicts with the allegations of the answer were not permitted, as the answer had to be under oath, and in such cases the court would strike out both the allegation of the original answer and the amendment (*Ozark Land Co. v. Leonard*, 24 Fed. 660); but under rule 30 the answer may state as many defenses as the defendant deems essential, regardless of consistency.

Amendment After Cause Ready for Hearing.

There should be very strong reasons to justify an amendment to the answer after the cause is ready for hearing, but there is no doubt of the plenary powers of the court to remove by amendment all impediments to the attainment of justice in the particular case. U. S. Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591; Rules 19-34; see *Lange v. Union P. R. Co.* 62 C. C. A. 48, 126 Fed. 340-341; *Rucker v. Bolles*, 67 C. C. A. 30, 133 Fed. 860; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522-529; *Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. 270; *Hicks v. Otto*, 85 Fed. 728. The rules heretofore stated as to "amending bills at and after trial" apply to the amendment of answers. And a party may be permitted to amend his answer at the hearing to conform to the proof (*Hamilton v. Southern Nevada Gold & S. Min. Co.* 33 Fed. 568, 15 Mor. Min. Rep. 314. See "Amendment of Bills at and after trial" and authorities cited); and unless there was an abuse of discretion, the granting or refusal by the court of the amendment would not be reviewable (*Roberts v. Northern P. R. Co.* 158 U. S. 26, 39 L. ed. 882, 15 Sup. Ct. Rep. 756).

Supplemental Answer.

New rule 32, which is substantially the same as old rule 46, provides, where a bill has been amended after answer filed, the defendant shall put in a new or supplemental answer within ten days after the amended bill or amendment is filed. Unless the time is enlarged, the failure to do so permits the plaintiff to take the amendment, or amended bill, as confessed.

Again, a supplemental answer may be filed upon application, upon reasonable notice, alleging material facts occurring after his former answer, or of which he was ignorant when it was made. New rule 34, which covers substantially old rule 57. (See Supplemental Bills.)

CHAPTER LXXII.

REPLICATION.

By equity rule 31, unless the answer asserts a set-off or counterclaim no replication is required without the special order of a court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter set up in the answer shall be deemed to be denied by the plaintiff. *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 382. Second. If the answer include a set-off or counterclaim the party against whom it is asserted must reply within ten days after the filing to the answer setting up the set-off or counterclaim, unless a longer time be allowed by the court or judge. Third. The rule further provides that if the counterclaim affects the rights of other defendants, then a copy of the same must be served on the solicitors or parties within ten days from the filing of the counterclaim. Then ten days shall be allowed to those defendants upon whom a copy of the counterclaim has been served, for filing a reply. In default of filing a reply a decree *pro confesso* on the counterclaim may be entered.

We see, then, that replications have been abolished except in the matter of set-off or counterclaim ordered by the court. With these exceptions, above stated, the answer puts in issue the allegations of the bill, and all the allegations of the answer are considered denied without the necessity of replication. The reply required by the new rule to the counterclaim is not a replication as known to the old rule, but simply has the effect of an answer putting in issue the new matter, and the rules governing answers apply. *Goodno v. Hotchkiss*, 230 Fed. 515; *Williams v. Adler-Goldman Commission Co.* 227 Fed. 374.

By acts of Congress March 3rd, 1915, where affirmative relief is prayed for in a suit at law the plaintiff must file a replication.

So far we have endeavored to state the new rules and procedure thereunder in preparing a case for final hearing in equity. In the past, judges have not followed the rules in many

cases, nor recognized any limitations to their discretion in applying them. In such cases their action was only the law of the particular case, and could not be regarded as precedent, but the result was confusion. Now that the new rules give larger discretion to the judges in granting or refusing orders in the preparation of a cause for final hearing, and now that many of the old rules that required some semblance of order in the procedure have been abrogated, I think we will realize fully the truth of the prevalent reproach to the system, that what may or may not be done to an equity suit in a Federal court depends on the condition of the judge's conscience, or the breadth of his discretion. In many instances the effort to eliminate and shorten the old rules has resulted in obscurity, and we must await the lapse of years before precedents can be assembled that will produce uniformity and definiteness in the construction of these new rules.

With due deference to the assembled wisdom that labored so long to create a system that would expedite the trial of equity causes, it is the belief of the writer that with a change in ten of the old rules, and the omission of a very few more that had practically become obsolete, a better result would have been reached without entirely wrecking the old system, which, though tardy, at times sought, at least, to create definiteness in the issue.

CHAPTER LXXIII.

DISMISSAL OF A CASE IN EQUITY.

By the Defendant.

Old equity rules Nos. 38 and 66 having been abrogated, there can be no dismissal by the defendant, as of course, of the bill. There are but two rules now affecting the rights of parties to dismiss the suit. New rule No. 29 contemplates that the defendant can only dismiss on an application by motion, or in the answer setting up some issue of law or fact, upon which the court must grant the dismissal. By new rule No. 57 when the case has been dropped from the trial calendar by continuance, and no application is made to reinstate it within the year, it is provided that the suit shall be dismissed without prejudice to a new one. Again, under the old rules, where the representative of a deceased complainant failed to revive a suit within a reasonable time, the defendant could dismiss it; but new rule No. 45, which is a substitute for the old rule, contemplates that any of the parties to the suit may revive it if the representatives of the deceased do not make the application within a reasonable time. *Davis v. Virginia R. & Power Co.* — C. C. A. —, 229 Fed. 633.

CHAPTER LXXIV.

CROSS SUITS.

The cross bill of the old practice was in the nature of an answer, and became necessary whenever the defendant sought affirmative relief, as the answer could only pray for a dismissal of the bill. *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 380; *Newton v. Gage*, 155 Fed. 608; *Weathersbee v. American Freehold Land Mortg. Co.* 77 Fed. 524; *North British & M. Ins. Co. v. Lathrop*, 17 C. C. A. 175, 25 U. S. App. 443, 70 Fed. 433; *Rickey Land & Cattle Co. v. Wood*, 81 C. C. A. 218, 152 Fed. 23; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Commercial Bank v. Sandford*, 103 Fed. 99; *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 768; *Gilmore v. Bort*, 134 Fed. 661; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 316; *Washington, A. & G. R. Co. v. Bradley (Washington, A. & G. R. Co. v. Washington)*, 10 Wall. 299, 19 L. ed. 894; *Wood v. Collins*, 8 C. C. A. 522, 23 U. S. App. 224, 60 Fed. 142. It was a counter bill against the plaintiff, or it may have been brought against the codefendants, or both together, but it was necessary to touch or be germane to the cause of action set up in the original bill. *Newton v. Gage*, 155 Fed. 608; *Book v. Justice Min. Co.* 58 Fed. 831; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162; *Brande v. Gilchrist*, 18 Fed. 465; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720. And new and distinct matters wholly disconnected with the original bill could not be introduced by a cross bill. *Bunel v. O'Day*, 125 Fed. 319; *Gilmore v. Bort*, 134 Fed. 658; *Hogg v. Hoag*, 107 Fed. 814; *Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co.* 46 Fed. 852; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851; *Ayres v. Chicago*, 101 U. S. 187, 25 L. ed. 840; *Cross v. DeValle*, 1 Wall. 5, 17 L. ed. 515; *Sunset Teleph. & Teleg. Co. v. Eureka*, 122 Fed. 960; *Thurston*

v. Big Stone Gap Improv. Co. 86 Fed. 484; Providence Rubber Co. v. Goodyear, 9 Wall. 809, 19 L. ed. 589; Kilburn v. Hirner, 163 Fed. 540; Springfield Co. v. Barnard Co. 81 Fed. 263, and cases cited; Goff v. Kelly, 74 Fed. 327; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; New Departure Bill Co. v. Hardware Specialty Co. 62 Fed. 463. See Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 86 Fed. 950, 951, and Bunel v. O'Day, 125 Fed. 304.

Under the old practice its uses were various:

First. To obtain affirmative relief against the plaintiff.

Second. It was used for discovery in aid of the answer, under old equity rule 72, but this rule is abrogated.

Third. As a matter of defense to the bill to set up new matter, when it was too late to set it up by plea or answer, as after replication and issue joined.

Fourth. To settle conflicting claims between defendants which are necessary to be adjusted before a complete decree can be entered.

Fifth. When necessary to bring about a complete determination of all matters affected by the bill.

Sixth. It was sometimes taken as an answer and vice versa.

By new rule 30 the answer may, without cross bill, contain as many defenses in the alternative, regardless of consistency, as the defendant may deem essential to his defenses. It may set up any counterclaim or set-off which might be the subject-matter of an independent suit in equity, or which may arise out of the transaction; and when so set up, it shall have the effect of a cross bill, so that the court may pronounce final judgment on the same suit, both on the original bill and the cross suit. Under this rule the cross suit set up in the answer may have for its subject-matter any *equitable* claim against the plaintiff which might be the subject-matter of an independent suit against him. Therefore the cross suit need not be confined to the subject-matter of the original bill, as new and distinct matter wholly disconnected with the subject-matter of the suit may be introduced in the answer. The old test, Do the matters in the cross bill grow out of, and does the relief prayed for depend on, the subject-matter of the original bill? no longer obtains. All that seems necessary now to the cross suit is that the claim set up be

an *equitable* one, such as could have been maintained against the plaintiff in an original suit in equity. That the purpose of the cross suit is different from the original bill, or the fact that the subject-matter of the cross suit is not germane, can no longer be set up to defeat the cross suit. So we see that cross bills are no longer necessary, as by rule 30 conflicting claims, and a demand for affirmative relief, must be set up in the answer.

Again, there is no feature of independence in the cross suit as in the old cross bill, as no citation is to be issued or served, but by new rule 31 the party against whom a set-off or counterclaim is set up must reply within ten days after filing the answer, unless further time be granted by the court or judge. If the counterclaim affects the rights of codefendants they or their solicitors must be served with a copy of the counterclaim within ten days from filing the same, and ten days within which to file a reply is accorded to the codefendant against whom the counterclaim is set up.

The Scope of the Cross Suit under the New Rules.

Much diversity of opinion has already arisen as to the scope and effect of rule 30 in abolishing cross bills and substituting cross suits in the answer.

In *Terry Steam Turbine Co. v. B. F. Sturtevant Co.* 204 Fed. 103, it is held that a counterclaim, to be the subject of a cross suit under the new rule, must "arise out of the transaction," which is the subject-matter of the original suit; that in an infringement suit, a cross suit for the infringement of another patent by plaintiff cannot be set up. (*McGill v. Sorensen*, 209 Fed. 876. See also *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 378); that the word "counterclaim" as used in the rule was not intended to include all cross claims upon which the defendant may sue the plaintiff in equity, but only such as are connected with or grow out of the subject-matter of the original bill. This case clearly indicates that the words "arising out of the transaction," in the rule, qualify the subsequent clause, "and may without cross bill set out any set-off or counterclaim which might be the subject of an independent suit in equity" against the plaintiff.

It is further said that the main purpose of the rule was to

dispense with cross bills, but to allow all matters that could heretofore be set up by cross bill, to be now set up in the answer; that the matters that could be set up by cross bill must be confined to the subject-matter of the suit in the original bill, and therefore wholly disconnected causes of action setting up new and distinct matter not germane to the subject-matter of the original bill, was not permitted under the new rule; that to make all claims having no remote connection with the original cause of action would be permitting two original bills in the same suit, which would be in violation of well-settled principles of equity,—citing *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402-410, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274. The court could not believe that so radical a change was intended by the new rules.

This case was followed by *Adamson v. Shaler*, 208 Fed. 566; *Sydney v. Mugford Printing & Engraving Co.* 214 Fed. 844; *Klauder-Weldon Dyeing Mach. Co. v. Giles*, 212 Fed. 452. So in *Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co.* 205 Fed. 375, it was held that damages arising out of tort not connected with the transaction, or any contractual relations upon which the suit was brought, would not be a proper subject of set-off, inasmuch as set-offs in equity must rest upon some equitable consideration or agreement between the parties,—citing many authorities. See *McGill v. Sorensen*, 209 Fed. 876. As to pleading diversion of funds as a counterclaim, see *Mississippi Valley Trust Co. v. Washington N. R. Co.* 212 Fed. 777.

In *Salt's Textile Mfg. Co. v. Tingle Mfg. Co.* 208 Fed. 157, the court insisted upon a more liberal construction of the rules intended to bring about a more speedy relief and settlement of all controversies between the parties in a single suit. However, in this case the counterclaim arose out of the transaction sued upon. *Buffalo Specialty Co. v. Vancleff*, 217 Fed. 91. See *United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co.* 216 Fed. 187. In *Marconi Wireless Teleg. Co. v. National Electric Signaling Co.* 206 Fed. 295, the court clearly distinguishes the mandatory and permissive clause of rule 30, which a proper construction of the rule demands, in view of the clear purpose of the rule to settle *all* controversies between parties in the bill and answer. The rule, after permitting the defendant to set up as many defenses, regardless of consistency, as he

deems essential to his defense, provides that (1st) any counterclaim arising out of the transaction which is the subject-matter of the suit, may be set up in the answer; and (2d) any set-off or counterclaim against the plaintiff which might be the subject of an independent suit against him may be set up in the answer. See *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 382; *United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co.* *supra*.

The courts hold that the first clause is mandatory, and a counterclaim growing out of the cause of action or subject-matter of the suit would be waived if not set up in the suit under this rule. (*Portland Wood Pipe Co. v. Slick Bros. Constr. Co.* 222 Fed. 530; *Marconi Wireless Teleg. Co. v. National Electric Signaling Co.* 206 Fed. 295, 296; *Salt's Textile Mfg. Co. v. Tingue Mfg. Co.* 208 Fed. 156; *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 377; *United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co.* 216 Fed. 187); while in the second or permissive clause a suit would not be waived by not setting up the independent cause of action, but the suit may be filed afterwards. The rule is emphatic that any claim which would be the subject-matter of an independent suit in equity may be, "without cross bill," set up in the answer.

In *Vacuum Cleaner Co. v. American Rotary Valve Co.* 208 Fed. 419, Judge La Combe recognizes the distinction in the two clauses of the rule.

Rule 30 was clearly intended (1st) to affirm the old jurisdictional maxim of equity, that a court of equity, having taken jurisdiction of a cause of action, will decide all incidental matters necessary for a full determination of the controversy between the parties; and consequently all claims against the plaintiff by a cross bill must now be set up in the answer.

2d. It was further intended to extend the defense to other controversies between the parties, which could not have been litigated by a cross bill under the former practice, because not incident to or germane to the subject-matter of the original suit. The simple test provided by the rule is, could the defendant have brought an original independent suit in equity against the plaintiff on the cause of action set up in the answer? In *Electric Boat Co. v. Lake Torpedo Boat Co.* 215 Fed. 382, the court pertinently says that as rule 26 allows a plaintiff to join

in one bill as many causes of action cognizable in equity as he may have against the defendant, rule 30 was intended to give the same option to the defendant, and thus place them on the same footing, as to joining causes of action; the saving clause being that if inconvenient to try the various causes of action at the same time, the court may order separate trials. Rule 26.

As to the Nature of the Causes of Action that May be Set Up in the Answer under Rule 30.

1st. Rule 30 provides that *any counterclaim* arising out of the transaction without reference to its being legal or equitable.

2d. Any counterclaim that might be the subject-matter of an *independent suit in equity*. Motion Picture Patents Co. v. Eclair Film Co. 208 Fed. 416.

As to the first clause, "*any counterclaim arising out of the transaction*" was only, as said, a reaffirmation of the practice under the cross bill, in which one could set up matters purely legal as well as equitable, if they were connected with the subject-matter of the original bill. See Rule 23. As to what could have been set up under the old cross bill which now may be set up by answer, as matters "*arising out of the transaction*," see the following authorities: Weathersbee v. American Freehold Land Mortg. Co. 77 Fed. 524; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 288, 33 L. ed. 904, 10 Sup. Ct. Rep. 550; Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 293. Thus a discharge in bankruptcy should be set up by cross bill. So an agreement, or conveyance. Carnochan v. Christie, 11 Wheat. 446, 6 L. ed. 516.

It has been held that mistake or fraud, or that one is an innocent purchaser, or that a party is not the assignee of the note sued upon, when a defense to a bill, may be set up by cross bill. Commonwealth Title Ins. & T. Co. v. Cummings, 83 Fed. 767. So a counterclaim is only recognized by cross bill. Brande v. Gilchrist, 18 Fed. 465; Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; United States Trust Co. v. Western Contract Co. 26 C. C. A. 472, 54 U. S. App. 67, 81 Fed. 468. However,

in *Bausman v. Denny*, 73 Fed. 69, the court intimates it can be set up by answer. But a suit for accounting does not need a cross bill; a balance in favor of defendant will be decreed without it. *Whittemore v. Patten*, 84 Fed. 57. Under the old practice, matters that should have been included in a cross bill were permitted to be set up by answer, and in the absence of objection relief would be granted. *United States v. Reese*, 166 Fed. 350; *Book v. Justice Min. Co.* 58 Fed. 831; *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 221, 34 L. ed. 886, 11 Sup. Ct. Rep. 258; *Bausman v. Denny*, 73 Fed. 69. In brief, you can now, under rule 30, set up any matter connected with the original transaction, in your answer by which affirmative relief is sought under the cross bill. *Chapin v. Walker*, 2 McCrary, 175, 6 Fed. 794; *Ewing v. Seaboard Air Line R. Co.* 175 Fed. 517; *Mitchell v. International Tailoring Co.* 169 Fed. 145; *Under-Feed Stoker Co. v. American Stoker Co.* 169 Fed. 892; *Ames Realty Co. v. Big Indian Min. Co.* 146 Fed. 169; *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 588, 126 Fed. 46; *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 773, 774; *Nelson v. Lowndes County*, 35 C. C. A. 419, 93 Fed. 538; *Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 27, 28; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Interstate Bldg. & Loan Asso. v. Edgefield Hotel Co.* 120 Fed. 423; *White v. Bower*, 48 Fed. 186; *Royal Union Mut. L. Ins. Co. v. Wynn*, 177 Fed. 293.

Mistake and fraud in the execution of the instrument sued on, whereby the true contract is not expressed, was set up by cross bill. *Commonwealth Title Ins. & T. Co. v. Cummings*, 83 Fed. 767. See *Royal Union Mut. L. Ins. Co. v. Wynn*, 177 Fed. 289; *Big Creek Gap Coal & I. Co. v. American Loan & T. Co.* 62 C. C. A. 351, 127 Fed. 627. You could set up by cross bill your title when sued to remove cloud from title. *Greenwalt v. Duncan*, 5 McCrary, 132, 16 Fed. 36. You could set up usurious interest, and ask for the penalty. *Weathersbee v. American Freehold Land Mortg. Co.* 77 Fed. 523. You could set up offsets by cross bill. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 615, 38 L. ed. 571, 14 Sup. Ct. Rep. 710; *Central Appalachian Co. v. Buchanan*, 33 C. C. A. 598, 62 U. S. App. 195, 90 Fed. 454. You could

reform and enforce an instrument which is sought to be canceled (Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 263, 264; Meissner v. Buek, 28 Fed. 163), or *vice versa* (Commonwealth Title Ins. & T. Co. v. Cummings, 83 Fed. 767); but in Northern R. Co. v. Ogdensburg & L. C. R. Co. 18 Fed. 815, 816, the court held it was not necessary to file a cross bill to reform, as it could be set up by answer. See Northern R. Co. v. Ogdensburg & L. C. R. Co. 20 Fed. 347; Bradford v. Union Bank, 13 How. 69, 70, 14 L. ed. 54, 55. You could file a cross bill to obtain delivery of property. Pullman Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808. You could by cross bill ask for a surrender of the agreement sought to be specifically performed. Meissner v. Buek, 28 Fed. 161; Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 264. You could in every case where a contract lien is sought to be enforced seek by cross bill to cancel it, or *vice versa*. Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 289; Milwaukee & M. R. Co. v. Chamberlain, 6 Wall. 748, 18 L. ed. 859; La Daw v. E. Bement & Sons, 66 Fed. 198; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 288, 33 L. ed. 904, 10 Sup. Ct. Rep. 550. Bondholders could by cross bill set up a diminution of the fund by bad management. Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80; Hogg v. Hoag, 107 Fed. 807, approved in 83 C. C. A. 677, 154 Fed. 1003; see Bowling Green Trust Co. v. Virginia Pass & Power Co. 132 Fed. 925, s. c. 164 Fed. 753; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 172. But see Fidelity Trust & S. V. Co. v. Mobile Street R. Co. 53 Fed. 852; Thurston v. Big Stone Gap Improv. Co. 86 Fed. 484, 485; Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co. 46 Fed. 853.

When a suit on an insurance policy is enjoined, you could recover the amount by way of cross bill. North British & M. Ins. Co. v. Lathrop, 63 Fed. 508. Prior mortgagee could by cross bill have his mortgage first foreclosed. First Nat. Bank v. Salem Capital Flour-Mills Co. 31 Fed. 583.

These citations sufficiently illustrate when cross bills were used for affirmative relief.

We thus see that every character of defense asking affirma-

tive relief, if in any way connected with the subject-matter of the original bill, could be set up by cross bill, the functions of which by rule 30 have now been transferred to the answer.

To Settle Matters Between Defendants.

Under the old practice when matters between the defendants were required to be settled, in order to render a complete decree in the case, they could be set up by cross bill and adjusted. *Weaver v. Alter*, 3 Woods, 152, Fed. Cas. No. 17,308; *Rickey Land & Cattle Co. v. Wood*, 81 C. C. A. 218, 152 Fed. 23; *Craig v. Dorr*, 76 C. C. A. 559, 145 Fed. 310 and cases cited. *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163, 9 Sup. Ct. Rep. 730; *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 744, 24 L. ed. 191; *Commercial Bank v. Sandford*, 103 Fed. 99; *Ames Realty Co. v. Big Indian Min. Co.* 146 Fed. 166. But issues independent of the bill could not be raised between the defendants in the cross bill. *Gilmore v. Bort*, 134 Fed. 658; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 410; *Vannerson v. Leverett*, 31 Fed. 377; see *Weaver v. Alter*, 3 Woods, 152, Fed. Cas. No. 17,307.

The issues between the defendants necessary to a complete decree in the whole case may now be set up in the answer, and in doing so the question of their citizenship is not material to the jurisdiction of the court. See latter part of new rule 31. (*Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 96; *Osborne & Co. v. Barge*, 30 Fed. 805; *First Nat. Bank v. Salem Capital Flour-Mills Co.* 31 Fed. 580; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 282; *Wabash R. Co. v. Adelbert College*, 208 U. S. 39, 52 L. ed. 379, 28 Sup. Ct. Rep. 182); nor the amount involved (*Kirby v. American Soda Fountain Co.* 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619). Of course the rule last stated would not apply to issues raised by the defendants not necessary to a complete decree in the original cause of action; citizens of the same state could not settle in a Federal court conflicting interests foreign to the main suit. Thus a nonresident suing for partition citizens of a State defendants by cross suit cannot litigate title as between themselves (*Beebe v. Louisville, N. O. & T. R. Co.* 39 Fed. 481; *Vannerson v. Leverett*, 31 Fed. 376; *Farmers' Loan & T. Co.*

v. San Diego Street-Car Co. 40 Fed. 110; Peacock, H. & W. Co. v. Thaggard, 128 Fed. 1006; Patton v. Marshall, 26 L.R.A.(N.S.) 127, 97 C. C. A. 610, 173 Fed. 351), unless the property is in court (Newton v. Gage, 155 Fed. 598; New Orleans v. Howard, 87 C. C. A. 345, 160 Fed. 397; United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673; Lilienthal v. McCormick, 54 C. C. A. 475, 117 Fed. 89; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 282; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; Park v. New York, L. E. & W. R. Co. 70 Fed. 642, 643).

An Independent Cause of Action may be Set Up in the Answer.

It will be seen that under the old cross bill no new and independent cause of action could have been set up. So we come to the phase of rule 30 which permits a dependant to set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit *in equity*, against him, which, as said before, was intended to extend and enlarge the defenses in equity which may be set up by a cross suit, and thus remove the limitations of the old cross bill. Buffalo Specialty Co. v. Vancleff, 217 Fed. 91.

You will notice under this phase of the rule that the independent cause of action which may be set up in an answer must be the subject of an independent suit *in equity*, thus excluding independent legal causes of action. This feature of the rule is a recognition of the divided system on the Federal administration of law and equity protected by the Constitution, and therefore all the causes of action set up must be of such a nature that the defendant could maintain an independent suit on the equity side of the court against the plaintiff over each cause of action. So joining legal and equitable causes of action under this phase of the rule would be objectionable as a misjoinder, and should be remedied as provided in new rule 29. In Atlas Underwear Co. v. Cooper Underwear Co. 210 Fed. 348, rule 30 was held not to entitle one not a necessary nor proper party to a suit to intervene to set up a counterclaim which has no bearing on the issues.

Form of the Cross Suit.

When affirmative relief is asked in the answer, it should be drawn with the same care as is required in setting up the cause of action in the original bill and presenting an appeal to equitable cognizance. New rules 25 and 30. When the causes of action are independent of the subject-matter of the original bill. Rule 30 requires the answer to state in short and simple terms any counterclaim arising out of the transaction which may be legal or equitable, as we have seen. See *United States v. Reese*, 166 Fed. 347. It is not necessary, however, in cross suits to set forth jurisdictional averments as to citizenship. *Badger Gold Min. & Mill Co. v. Stockton Gold & Copper Min. Co.* 139 Fed. 840.

Parties to Cross Suits.

Rule 30 provides that where the defendant has a set-off or counterclaim against the plaintiff, he may, without cross bill, set it up in the answer. Both rules 30 and 31 evidently contemplate, that the set-off and counterclaim must be confined to the parties plaintiffs and defendants in the suit, and you cannot use the cross suit to introduce new parties. This would be unquestionably true where the counterclaim arose out of the subject-matter of the suit by plaintiff (*Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 90; *United States Gypsum Co. v. Hoxie*, 172 Fed. 505; *Bunel v. O'Day*, 125 Fed. 319; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162; *United States Gypsum Co. v. Hoxie*, 172 Fed. 505; *Newton v. Gage*, 155 Fed. 610; *Thruston v. Big Stone Gap Improv. Co.* 86 Fed. 484; *Patton v. Marshall*, 26 L.R.A.(N.S.) 127, 97 C. C. A. 610, 173 Fed. 350; *Central Trust Co. v. Cincinnati, H. & D. R. Co.* 169 Fed. 466; *Adelbert College v. Toledo, W. & W. R. Co.* 47 Fed. 846); because in such cases the cross suit would be wholly defensive; but where the cross suit involves a counterclaim unconnected with the subject-matter of the bill, and might be subject of an independent suit in which affirmative relief may be given, new parties necessary to granting the relief may be brought in, as would be permitted in an independent suit. New rule 37, which provides "that any person may at

any time be made a party if his presence is necessary or proper to a complete determination of the cause." See *Ulman v. Jaeger*, 155 Fed. 1016, 1017, and cases cited; *Mercantile Trust Co. v. Atlantic & P. R. Co.* 70 Fed. 518. Anyone who could intervene in the independent cross suit could be made a party (rule 37, last clause) if his presence was necessary or proper for its determination. *Atlas Underwear Co. v. Cooper Underwear Co.* 210 Fed. 355. The case of *Adamson v. Shaler*, 208 Fed. 566, cited in the above case, is not a proper construction of rule 30 in its application to cross suits based upon independent causes of action brought by defendants. See *United States v. Woods*, 138 C. C. A. 578, 223 Fed. 316.

Filing the Cross Suit.

By rules 12 and 16 the defendant is required "to file his answer on or before the twentieth day after the service of the subpœna," in which answer the cross suit may be set up, or it may be, under rule 30, set up by amendment by leave of the court after reasonable notice, and at any time before decree, if the end of justice demands it.

Amending the Cross Suit.

The court may at any time, in furtherance of justice, permit any pleading or proceeding to be amended. New rule 19. So a further and better statement of the nature of a claim, whether in the original bill or in defense, may in any case be ordered upon terms. New rule 20. By rule 30 the answer may be amended by leave of the court or judge, upon reasonable notice, so as to put any averment in issue when justice requires it.

Putting the Cross Suit in Issue.

By rule 31 unless the answer asserts a set-off or counterclaim no reply shall be required to put the answer in issue, unless the court orders a reply; but the matters in the answer shall be deemed to be denied; but if the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after filing the answer, unless further time be granted by the court or judge. In default of a reply, a decree *pro confesso* may be entered on the cross claim.

Service of the Counterclaim.

There is no provision by rule for the service of the answer setting up a counterclaim of any character, except when the counterclaim is one which affects the rights of other defendants. In such cases the party setting up the counterclaim must serve a copy of the pleading on such other defendants or their solicitors within ten days from the filing of the same, and such defendants shall have ten days after service to reply, in default of which a decree *pro confesso* may be entered. See *Fidelity Trust Co. v. D. T. McKeithan Lumber Co.* 212 Fed. 231, 232, for illustration.

Hearing the Cross Suit.

Where the cross suit sets up a counterclaim arising out of the transaction, the original and cross demand should be considered together; but where the answer sets up independent suits unconnected with the original cause of action set forth in the bill, the court may, if convenient, hear them together; if not, it may order separate trials. Rule 26. The last clause of rule 30 provides that the court may pronounce a final judgment in the same suit, both on the original and cross claims. See the two preceding sections as to when judgments by default may be entered on the cross suits.

Effect of Dismissing the Original Bill.

Where the answer seeks affirmative relief by way of cross suit, the dismissal of the original bill would not affect the cross suit. *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 427; *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 768; *Craig v. Dorr*, 76 C. C. A. 559, 145 Fed. 310; *Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Co.* 139 Fed. 838-840; *Markell v. Kasson*, 31 Fed. 104; *Jesup v. Illinois C. R. Co.* 43 Fed. 495; *Small v. Peters*, 104 Fed. 401; *Heinze v. Butte & B. Consol. Min. Co.* 61 C. C. A. 63, 126 Fed. 6; *San Diego Flume Co. v. Souther*, 32 C. C. A. 548, 61

U. S. App. 134, 90 Fed. 164; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 722; *Holgate v. Eaton*, 116 U. S. 42, 29 L. ed. 540, 6 Sup. Ct. Rep. 224. However, where the cross suit was entirely defensive, so that it would be useless if the original bill was dismissed, then the cross suit would fall with the original bill. *Small v. Peters*, 104 Fed. 403; *Jesup v. Illinois C. R. Co.* 43 Fed. 495; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 6 Wall. 747, 18 L. ed. 859; *Dows v. Chicago*, 11 Wall. 112, 20 L. ed. 67; *Industrial & Min. Guaranty Co. v. Electrical Supply Co.* 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. 742. So when cross bill is between citizens of same State, *Cabaniss v. Reco Min. Co.* 54 C. C. A. 190, 116 Fed. 319.

CHAPTER LXXV.

INTERVENTION.

What is.

Intervention is the application of a person not a party to the suit to litigate some claim of title or interest, by way of lien or otherwise, in the property which is the subject-matter of the suit, or which has been drawn into the possession of the court during the progress of the cause.

Two Kinds.

New rule 37, last clause, provides that anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding. *Atlas Underwear Co. v. Cooper Underwear Co.* 210 Fed. 348; *Hutchinson v. Philadelphia & G. S. S. Co.* 216 Fed. 795; *Glass v. Woodman*, 223 Fed. 621 (Must have interest or lien). While the new rule permits one claiming an interest to intervene at any time, yet it is required to be in subordination to the main proceeding. It is evidently contemplated that the application must (1st) show a substantial interest in the subject-matter of the main proceeding in order to assert the right; (2d) that the intervention sought must have regard to and be in subordination to the issues in the main suit, so as not to needlessly interfere with the orderly progress of the main suit.

The mere fact that a party asserts some interest in the controversy or in the property does not bind the court to permit the intervention (*Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739), even though the property be in the hands of a receiver (*ibid.*). If the interest asserted would not be affected by the

proceedings, or where it appears that the right asserted is entirely subordinate to the rights of the parties to the suit, or that the interest of one seeking intervention is already represented in the case, or that he has other adequate remedies to protect his interest without burdening the principal suit with his collateral issues, then the right of intervention lies wholly within the court's discretion. *Ibid.*; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed. 30, and cases cited; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824; *Credits Commutation Co. v. United States*, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; *Jones v. Sands*, 25 C. C. A. 233, 51 U. S. App. 153, 79 Fed. 913; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Sands v. E. S. Greeley & Co.* 80 Fed. 195; *Continental & Commercial Trust & Sav. Bank v. Allis-Chambers Co.* 200 Fed. 601; *United States Trust Co. v. Chicago Terminal Transfer Co.* 110 C. C. A. 270, 188 Fed. 292. On the other hand, the right to intervene may be absolute, that is, to forbid it may be appealed from as an abuse of discretion. *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739; *Brinckerhoff v. Holland Trust Co.* 146 Fed. 203; *Tift v. Southern R. Co.* 159 Fed. 558, 559; *Credits Commutation Co. v. United States*, 34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 853); as where the petition for intervention shows that in the pending suit the right of the party seeking intervention is in jeopardy, that is, an inability to obtain relief by other means, as when the party seeking intervention has a lien or title to the subject-matter in the hands of the court, or a present right to possession superior to the rights asserted in the main suit; or when the refusal would be a practical denial of relief, as where in the pending suit the fund may be dissipated out of which he must look for relief, these and kindred conditions make the right to intervention absolute, and a refusal may be appealed from as a right. *Credits Commutation Co. v. United States*, 34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824, and authorities above cited; *Credits Commutation Co. v. United States*, 177 U. S. 315, 316, 44 L. ed. 785, 786, 20 Sup. Ct. Rep. 636; *Central Trust Co. v. Chicago, R. I. & P. R. Co.* 134 C. C. A. 144, 218 Fed. 336.

So, then, we see that there are, as said in *United States Trust Co. v. Chicago Terminal Transfer Co.* 110 C. C. A. 270, 188 Fed. 292, two kinds of intervention. In one the applicant having other means of redress open to him, the court may refuse to incumber the main case with collateral issues; while in the other the applicant's claim for relief depends on intervention in the case in which it is sought. However, this case recognizes the fact that an election of remedies is not by any means a sole test controlling the court's discretion. See the following authorities: *Ex parte Cutting*, 94 U. S. 22, 24 L. ed. 51; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824, and cases cited; *Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 111, 52 L. ed. 413, 28 Sup. Ct. Rep. 219; *Land Title & T. Co. v. Tatnall*, 65 C. C. A. 671, 132 Fed. 305; *Land Title & T. Co. v. Asphalt Co.* 62 C. C. A. 23, 127 Fed. 2; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *Central Trust Co. v. Cincinnati, H. & D. R. Co.* 169 Fed. 470; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 863; *Central Trust Co. v. Chicago, R. I. & P. R. Co.* 134 C. C. A. 144, 218 Fed. 339.

Procedure.

You must file a petition asking permission of the court to file a bill of intervention in all cases where the right to intervene is within the sound discretion of the court. *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 392; *Perry v. Godbe*, 82 Fed. 143; *Born v. Schneider*, 128 Fed. 179. The form of the proceeding is determined by the circumstances of the case. *Krippendorf v. Hyde*, 110 U. S. 286, 28 L. ed. 149, 4 Sup. Ct. Rep. 27. And it must not only appear that a petition was filed, but that it was granted. *Ibid.*; *Washington, G. & A. R. Co. v. Bradley*, 7 Wall. 575, 19 L. ed. 274; *Perry v. Godbe*, 82 Fed. 143. See *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 46 U. S. App. 268, 76 Fed. 254.

Form of Application.

Title as in bill, thus: A. B. vs. C. D.; F. W., Intervener.

To the Honorable Judges of the District Court of the United States for the
District of.....:

The petition of F. W., a citizen of and residing in.....county in

the State of....., humbly complaining of A. B., plaintiff, and C. D., defendant, in the above cause, would show unto your honors that A. B., plaintiff, did on the.....day of....., A. D. 19..., file his bill in this cause wherein he (here set forth substance of bill and prayer); that on the.....day of....., A. D. 19..., the defendant C. D. filed his answer (or such proceedings as were taken, setting forth only the substance); that petitioner claims an interest, etc. (here set forth interest, showing how it arose and the necessity for intervention and a right to participate in the decree).

Then pray for permission to file the intervention and the relief desired by your intervention.

This petition should be accompanied with your pleading you seek to file in the event you are let in, and the court must see from the pleading—

First. That there will be no delay to the plaintiff in prosecuting his suit.

Second. That the pleading is reasonably sufficient to effect the purpose intended, and,—

Third. As before stated, that it is a proper case for intervention. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 174, 175.

Contesting Application.

Any of the parties to the suit may contest the application, and they have a right to have all the grounds upon which the application is based to be specifically set forth. See *Powell v. Leicester Mills*, 92 Fed. 115, 116. While the petition in intervention may not be as formal as a bill, yet it should exhibit all the material facts relied upon, and embody by recital or reference as much of the record of the original suit as is essential; also proceedings taken in the main suit after filing the petition, which would strengthen the right of petitioner, may be incorporated by amendment. *Empire Distilling Co. v. McNulta*, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 701.

Order When Application Granted.

Title as in bill; W. F., intervener.

This cause coming on to be heard on the application of W. F., intervener in this suit, to be made a party (plaintiff or defendant), and the petition having been duly considered, and it appearing to the court that the said

W. F., petitioner (here state the basis of the application that the court has found true).

It is therefore ordered, adjudged, and decreed that W. F., petitioner, has leave to intervene in said suit and to that end may appear in said suit within.....days from the date of this order, in the same manner and with like effect as if named in the original bill as a party (plaintiff or defendant).

This order to be without prejudice to any proceedings heretofore had in this cause.

Judge, etc.

Effect of Order.

The effect of the order is to make the applicant a party to the suit in all subsequent proceedings, and gives the right of appeal. *Rice v. Durham Water Co.* 91 Fed. 433. *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 8.

But intervention cannot affect jurisdiction once obtained (*Clarke v. Eureka County Bank*, 116 Fed. 534), though asserted by cross bills against other defendants from same State. (*Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89). Nor can an intervener attack jurisdiction. *Morton Trust Co. v. New York & O. R. Co.* 105 Fed. 539; *Rice v. Durham Water Co.* 91 Fed. 434; *Sioux City Terminal R. & Warehouse Co. v. Trust Co.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 128.

Waiving Order of Intervention.

While leave to intervene should be by order, yet parties to the suit failing to object to it on that account waive it, or filing an answer to the intervening bill. *Perry v. Godbe*, 82 Fed. 141; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 864, and cases cited; *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 40 U. S. App. 341, 76 Fed. 254; *Gest v. Packwood*, 39 Fed. 536; *French v. Gapen*, 105 U. S. 525, 26 L. ed. 956.

Notice of Intervention.

Notice is not necessary, the filing of the application is sufficient; however, in *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 325; *McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 378, it is held that to give notice is the better practice, though there is no rule requiring it. *Ibid.*; *Central Trust Co. v. Madden*, 17 C. C. A. 236, 25 U. S. App. 430, 70 Fed. 453.

Making Defendant by Intervention.

The general rule is that a stranger cannot make himself a defendant in a suit in equity, and courts of equity have adhered to this rule as a basis in determining whether the application to intervene should be granted. *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326; *Smith v. Gale*, 144 U. S. 519, 36 L. ed. 525, 12 Sup. Ct. Rep. 674; *Chester v. Life Asso.* 4 Fed. 488-491. In *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 170, the court says: "That a stranger to a suit will not be permitted on his own application to be made a party defendant in an equity suit over the objections of plaintiff is a well established general rule to which there are few exceptions" (and the reasons are fairly stated in *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 845; *Chester v. Life Asso. of America*, 4 Fed. 491), unless, of course he is an indispensable party. *Carter v. New Orleans*, 19 Fed. 659; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160. In such case a court will require the plaintiff to amend his bill on penalty of dismissal for want of parties essential to determining the case. See *Chester v. Life Asso. of America*, 4 Fed. 491, for further exceptions to the rule.

The equities of the case must show strongly the necessity of admitting a stranger to the suit as defendant on his own application, and the petition to intervene as defendant must be accompanied by the proposed answer upon the face of which the necessity appears. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 168. The court should exercise extreme caution (*Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326), and it should appear that the interest of the party seeking to be made a party to the suit is of a direct and immediate character that is a claim to or lien upon the property involved (*Carter v. New Orleans*, 19 Fed. 659; *Smith v. Gale*, 144 U. S. 518, 36 L. ed. 524, 12 Sup. Ct. Rep. 674; *Clarke v. Eureka County Bank*, 116 Fed. 537, and cases cited); and even then it rests in the sound discretion of the chancellor (*Hamlin v. Toledo St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 665; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed.

30; *Newton v. Gage*, 155 Fed. 598). A general averment of interest is bad; it must state facts showing interest. *Clarke v. Eureka County Bank*, 116 Fed. 536, 537.

The reason of this caution on the part of the courts is based upon the theory that the plaintiff should not be compelled to enter into litigation with parties not of his own seeking; if so, what he sets out to do by a simple suit may, against his will, become complicated, expensive and interminable. *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 845; *Chester v. Life Asso. of America*, 4 Fed. 491, 492. If plaintiff has failed to make the necessary parties, the remedies are pointed out in the rules heretofore explained. *Ibid.* While *Galveston H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199, and *Ex parte South & North Ala. R. Co.* 95 U. S. 221, 24 L. ed. 355, seem to militate against this rule, yet in these cases the admission of the parties upon their application was not contested. See *Atlas Underwear Co. v. Cooper Underwear Co.* 210 Fed. 347.

I have thus considered the rule applicable to one who is a stranger to the suit seeking to be made a party against the will of the plaintiff. The rule would not apply where,—

First. The application is made by one who was named in the suit, but not served with process, but subsequently comes within the jurisdiction.

Second. When the application is made by one of a class represented in the bill, and for whose benefit or against whom the suit is brought. *Chester v. Life Asso. of America*, 4 Fed. 491; *Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co.* 53 Fed. 850; *Forest Oil Co. v. Crawford*, 42 C. C. A. 54, 101 Fed. 851; *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326.

Third. When the party applying represents a party to the bill whose interest has been transmitted by death or operation of law. *Ex parte South & North Ala. R. Co.* 95 U. S. 226, 24 L. ed. 357; *Chester v. Life Asso. of America*, 4 Fed. 491.

In the second and third exceptions it will be seen that the persons allowed to become parties are not altogether strangers, but in effect are quasi parties. *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 850; *Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 83.

Under the second, where the suit is by some of a class for the

benefit of all similarly situated, and a common trustee is defendant, or where a suit is by a common trustee and relates to the mortgage or trust deed, a beneficiary will not be allowed to come in, unless his interests are in jeopardy by reason of collusion or incompetency or fraud of the trustee. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 172. See *Williams v. Morgan*, 111 U. S. 696, 697, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; *Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106; *Fletcher v. Ann Arbor R. Co.* 53 C. C. A. 647, 116 Fed. 481; *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 182; *Carter v. New Orleans*, 19 Fed. 659; *Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* 71 Fed. 39.

Pro Suo Interesse.

What has heretofore been said refers to one who seeks to be made a party on his own application to contest the issues in the principal case, and whereby, as we have seen, he becomes as fully a party to the original suit as if named in the original bill. This question of making defendants or parties by intervention, as stated in *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 846, is entirely different from that of an intervention *pro suo interesse*, permitted in *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Perry v. Godbe*, 82 Fed. 143; *Phelps v. Oaks*, 117 U. S. 241, 29 L. ed. 890, 6 Sup. Ct. Rep. 714; *Raisin v. Statham*, 22 Fed. 146, and in cases hereafter to be cited. In this latter case the applicant does not become a party to the main controversy, nor can such applicant change the main issues by his intervention. *Ibid.* Thus when the court has jurisdiction of the *res*, or where a fund is to be distributed, and the party has to prove his claim against the *res*, or fund, or where one beneficiary desires to contest the claim of another to the fund, then intervention lies.

The possession of the court draws the right to intervene by parties having a claim. *Rouse v. Letcher*, 156 U. S. 50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 504,

505; Central Trust Co. v. Carter, 24 C. C. A. 73, 41 U. S. App. 663, 78 Fed. 233; Myers v. Luzerne County, 124 Fed. 437; Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 231; Rice v. Durham Water Co. 91 Fed. 433. So a fund to be distributed entitles all parties claiming an interest to intervene and show it, and this is true, though the jurisdiction of the court would forbid the filing of an original bill. Ibid.; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 172; Central Trust Co. v. Carter, 24 C. C. A. 73, 41 U. S. App. 663, 78 Fed. 233; National Bank v. Allen, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 555.

These rules are illustrated by the familiar cases of receiverships, where a party, without reference to citizenship or amount, may intervene. Electrical Supply Co. v. Put-in-Bay Waterworks, Light & R. Co. 84 Fed. 740; Fish v. Ogdensburgh & L. C. R. Co. 79 Fed. 131; Lamb v. Ewing, 4 C. C. A. 320, 12 U. S. App. 11, 54 Fed. 273; Farmers' Loan & T. Co. v. Houston & T. C. R. Co. 44 Fed. 116; Carey v. Houston & T. C. R. Co. 52 Fed. 674.

So in creditors' bills, the practice of permitting judgment creditors to make themselves parties *without leave* of court is well settled. Myers v. Fenn, 5 Wall. 207, 18 L. ed. 606; Richmond v. Irons, 121 U. S. 43-47, 30 L. ed. 869-871, 7 Sup. Ct. Rep. 788; National Bank v. Allen, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545-555; Hubb v. Bidwell, 81 C. C. A. 43, 151 Fed. 564.

The power of a court of equity to permit such interventions rests independent of statute. Rice v. Durham Water Co. 91 Fed. 433, 434; Gregory v. Van Ee, 160 U. S. 646, 40 L. ed. 567, 16 Sup. Ct. Rep. 431. It is necessarily inherent, or its process would be abused to the injury of others. Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279.

When Intervention Will Not Lie.

In Rouse v. Hornsby, 14 C. C. A. 377, 32 U. S. App. 111, 67 Fed. 220, it was held that when the petition for intervention shows a legal demand, such as damages for personal injury, plaintiff is entitled to a jury to assess; that is, you must establish your claim at law before you can file an intervention.

Again, a claim cannot be the subject-matter of intervention in one ancillary jurisdiction, when the party lives and the claim arose in another ancillary jurisdiction. *Clyde v. Richmond & D. R. Co.* 65 Fed. 338, 339; *Sands v. E. S. Greeley & Co.* 80 Fed. 196; *Central Trust Co. v. United States Flour Mill Co.* 112 Fed. 371; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 72 Fed. 26.

To illustrate: A receiver is appointed in Texas of a railroad running through other States, in which other States ancillary receiverships have been appointed by the Federal courts, say Arkansas and Missouri, then a claim originating in Arkansas cannot be the subject-matter of intervention in Missouri.

An equitable right cannot be the subject-matter of intervention in a suit at law. *Gravenberg v. Laws*, 40 C. C. A. 240, 100 Fed. 5, 6; *Clarke v. Eureka County Bank*, 116 Fed. 534; *McKenny v. Supreme Lodge, A. O. U. W.* 104 C. C. A. 117, 180 Fed. 961. The equitable right must be enforced by a bill in equity, which would be ancillary to the lawsuit, and the question of parties as affecting diversity of citizenship would not affect jurisdiction. Neither would the amount or value of the interest. *Gravenberg v. Laws*, *supra*; *Clarke v. Eureka County Bank*, 116 Fed. 534; *Krippendorf v. Hyde*, 110 U. S. 287, 28 L. ed. 149, 4 Sup. Ct. Rep. 27.

Nor will intervention lie after decree, unless to protect an interest which cannot otherwise be protected. *United States v. Northern Securities Co.* 128 Fed. 808.

Form of Intervention When Res in Court's Possession.

Having stated the right of intervention when the *res* is in possession of the court, I will now suggest a form to be used.

Title as in bill (in which receiver appointed or the *res* or fund was put into the hands of the court) adding as before W. F., intervener.

Your petitioner, W. F., a citizen of and residing in the county of..... in the State of....., praying for leave to intervene in the above cause, respectfully represents that on the.....day of....., A. D. 19..., and prior to the order of this court appointing John Smith receiver of the (railroad, estate, or fund), and placing the property of said (railroad, estate, or fund) in his hands as such receiver, all of which matters are now pending in this honorable court, your petitioner obtained a judgment in the.....court of.....county, in the State of....., against

the said (railroad, estate, or fund) (here describe judgment or claim, giving court date, amount, etc., and attach certified copy; or, if judgment has been recovered against the receiver so state; in a word, accurately state your claim, whatever it may be, and such evidence of it as will satisfy the court).

That said judgment (or claim) declares and establishes the said sum ofdollars as a proper charge (or said claim is a proper charge, etc.) and lien on the earnings of said railroad (or the property of said estate or the fund, etc.), and petitioner prays an order of this honorable court to permit him to intervene and upon hearing to have the lien fixed and the judgment paid in the due order of the administration of the trust and for such further order as to the court may seem equitable.

R. F.
Solicitor.

Attach, as stated, your judgment, certified to from the court where obtained, or your claim properly verified. You may also attach to the petition a motion to refer to the special master usually appointed in these cases, unless there be a general order in the case, as is usual, to refer all intervening petitions to the special master, in which case the clerk will refer the case.

If a motion is necessary, then file as follows:

Title as in bill; W. F., Intervener.

Now comes W. F., intervener, by counsel, and moves the court to refer his petition for intervention in all things to E. M., Esq., special master in chancery, for his examination and report, and intervener will ever pray, etc.

R. F.,
Solicitor, etc.

Citizenship and Amount as Affecting Jurisdiction of Federal Courts in Intervention, Pro Suo Interesse.

The rule of jurisdiction in Federal courts depending on citizenship and amount, or value of the subject-matter, does not apply to interventions, or other auxiliary suits. Citizenship is not material, and Federal courts having jurisdiction of the original suit; and *having in possession* the property or fund in which the intervener has an interest will permit an intervention *pro suo interesse* without reference to the citizenship of the parties, and this intervention will be permitted by motion, petition, or by ancillary bill in equity; and in whatever way

you seek the intervention you may use substantially the form given. *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279.

The diverse citizenship of the original parties, if that be the ground of jurisdiction, is sufficient to support subsequent interventions. *Newton v. Gage*, 155 Fed. 604, and cases cited; *Clarke v. Eureka County Bank*, 116 Fed. 534; *Society of Shakers v. Watson*, 68 Fed. 730; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 96; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 642; *Osborne v. Barge*, 30 Fed. 805; *Park v. New York, L. E. & W. R. Co.* 70 Fed. 641; *Rouse v. Letcher*, 156 U. S. 50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; *Henderson v. Goode*, 49 Fed. 887; *Farmers' Loan & T. Co. v. Houston & T. C. R. Co.* 44 Fed. 115. But diverse citizenship of original parties will not support an intervention of a third party who is a citizen of the same State with defendant, unless the controversy between complainant and defendant is one which *draws to the court's possession* the defendant's property in which intervener claims an interest. *United Electric Securities Co. v. Louisiana Electric Light Co.* 68 Fed. 673; *Seligman v. Santa Rosa*, 81 Fed. 524. See *Forest Oil Co. v. Crawford*, 42 C. C. A. 54, 101 Fed. 849. So citizens of a State having property attached and thus drawn into the Federal court may intervene *pro suo interesse* for its protection. *Compton v. Jesup*, 68 Fed. 280, and authorities cited; *Gumbel v. Pitkin*, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

Nor is Amount Important.

When the Federal court has jurisdiction, and the control of the fund or property, it can entertain jurisdiction of an intervention without reference to the amount or value of intervener's claim. *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 40 U. S. App. 341, 76 Fed. 252; *National Bank v. Allen*, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545.

Amendment of.

Bill of intervention may be amended. *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. 212-217.

Denial of, Not Appealable.

An order denying the right to intervene is not appealable (Farmers' & M. Bank v. Arizona Mut. Sav. & L. Asso. 135 C. C. A. 577, 220 Fed. 7; Clark v. Arizona Mut. Sav. & L. Asso. 217 Fed. 640), unless there is a practical denial of certain relief to which the intervener is clearly entitled, and in cases where intervention is not discretionary. 220 Fed. 7, and cases cited; but see Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636.

CHAPTER LXXVI.

INTERLOCUTORY PROCEEDINGS.

Interlocutory Orders.

I will now conclude the discussion of the successive steps in a suit in equity, which matures the case for taking evidence, by a brief general view of interlocutory orders. It is necessary, as we have seen at various stages of its progress, to take orders in furtherance of its preparation for final hearing, or for the preservation and protection of property in litigation, or rights therein, as heretofore shown. All such orders are called interlocutory orders, and are limited as to time, on their faces sometimes, or by law, as in case of injunctions (equity rule 73; U. S. Rev. Stat. sec. 719), or they may continue in force until the final hearing.

As said, they may be granted at any time during the progress of the cause, either in term time or vacation, on motion days or such time as the court may appoint for hearing, when not grantable of course. All interlocutory decrees remain under the direction of the court, to be set aside by proper application at any time (*Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 708; *Blythe v. Hinckley*, 84 Fed. 228), and no appeal lies therefrom. (*Ibid.*; *Perkins v. Fourniquet*, 6 How. 209, 12 L. ed. 407; see "Appeals"). They are granted on petition or motion, and may be on *ex parte* applications, as in cases of imminent danger to property, but the general rule is to serve notice of the application for them by motion or otherwise.

When a motion for any character of interlocutory order is made, it should set out every material fact necessary to relief, and especially is this so when a preliminary order is sought that is necessary to protect some right or the property in litigation. Motions of the latter class must be supported by affidavits, and

when the application is *ex parte*, the necessity of such character of application must be shown in the affidavits.

Again, if interlocutory relief in such cases is necessary at the time of filing the bill, the facts to support it ought to be set up in the bill, and the bill be sworn to and supported by affidavits, and the prayer; whether the application be by motion or contained in the bill, it must specifically pray for the relief required and must conform to the case made.

Injunctions.

Writs of injunction pending a suit in equity may issue whenever cause exists, by the court or a judge thereof.

By new rule 73 a temporary restraining order or preliminary injunction pending suit may be granted. See Judicial Code, secs. 264-266, Comp. Stat. 1913, secs. 1241-1243. See also *Universal Sav. & T. Co. v. Stoneburner*, 51 C. C. A. 208, 113 Fed. 254; *Horn v. Pere Marquette R. Co.* 151 Fed. 634; *Thullen v. Triumph Electric Co.* 128 C. C. A. 655, 212 Fed. 143; *Cathey v. Norfolk & W. R. Co.* — C. C. A. —. Again, by new rule No. 25, where special relief of this nature is required pending the suit, the bill should be sworn to by the plaintiff, or anyone having knowledge of the facts. New rule No. 74 provides for injunctions pending appeal, to be hereafter noticed.

By Whom Granted.

By section 264, Judicial Code, injunctions may be granted by any justice of the Supreme Court in cases where they may be granted by the Supreme Court; and by any judge of the district court in cases where they may be granted by the district court.

No justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he has been allotted, elsewhere than in such circuit, or any place outside of the circuit where parties stipulate in writing it can be heard, except when it cannot be heard by the district judge of the district. When the district judge is absent from his district, or is under disability, any circuit judge of the circuit in which the district is situated may grant the restraining order.

When the injunction is sought to suspend or restrain the enforcement, operation, or execution of any statute of a State, by restraining the action of any officer of such State in the enforcement or execution of such statute, it cannot be granted or issued by any justice of the Supreme Court, or by any district court of the United States, or any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application shall be presented to any one of the judges above named, who shall immediately call to his assistance two other judges to hear the application. Three judges must hear the application, one of whom must be either a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges. Judicial Code, sec. 266.

In case of danger of irreparable loss or damage, a temporary restraining order may be issued by any of the judges who are authorized to hear the cause, to be in force until the hearing and determination of the application. Upon notice as aforesaid, which means notice to governor and attorney general of the state, and such other persons as may be defendants in the suit. On March 4th, 1913 (37 Stat. at Law, 1013, chap. 160, Comp. Stat. 1913, sec. 1243), sec. 266 of the Judicial Code was amended as follows: or "in the enforcement or execution of an order made by an administrative board or commission acting under or pursuant to the statutes of such state." *Louisville & N. R. Co. v. Railroad Commission*, 208 Fed. 37; *Seaboard Air Line R. Co. v. Railroad Commission*, 129 C. C. A. 613, 213 Fed. 27. This amendment was evidently induced by the strict construction given to the act, and limiting its purpose only when the constitutionality of a State statute was attacked, as in *Chicago, B. & Q. R. Co. v. Oglesby*, 198 Fed. 153; *Cumberland Teleph. & Teleg. Co. v. Memphis*, 198 Fed. 956, 957. It will be noticed that it is only when an *interlocutory* injunction is asked for that three judges are required to sit in the case. So, when a permanent injunction is asked for, and there is no prayer for a preliminary injunction or injunction *pendente lite*, or the interlocutory injunction is waived and the case goes to trial on its merits section 266 (Comp. Stat. 1913, sec. 1243), does not apply. *Seaboard Air Line R. Co. v. Railroad Commission*, 129 C. C. A. 613, 213 Fed. 27.

Again, it is held that a "statute of a State," as embodied in section 266, does not apply to the ordinance of a city, as it is apparent that the intent of the act was to prevent a single United States district judge from stopping the functions of a State government, and the statute of a State means one passed by a State legislature, and any officer of a State meant an officer whose authority extended throughout the State. *Cumberland Teleph. & Teleg. Co. v. Memphis*, 198 Fed. 957.

In *Lykins v. Chesapeake & O. R. Co.* 126 C. C. A. 395, 209 Fed. 573, it was held that section 266 did not apply to a suit to enjoin a tax levied for the benefit of a turnpike company. However, in this case the act was not attacked as unconstitutional, authorizing the tax. See also *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497.

Security on Issuing Restraining Order.

By act October 15th, 1914, sec. 18, no restraining order can issue without security in such sum as the judge may fix except as provided in section 16 of the Act. *Re Burr Mfg. & Supply Co.* 217 Fed. 16. See 38 Stat. at L. 737, chap. 323, for provision of section 16, restraining violation of anti-trust laws.

What Order Shall Set Forth.

By section 19 of the above act, every order shall set forth the reasons for issuing the injunction, and the act or acts sought to be restrained, and such order shall only be binding on the parties to the suit, or those in active concert or participating with them and who, by personal service or otherwise, have received actual notice of the same.

Restraining Orders Between Employers and Employees.

No restraining order shall be granted in any case between employer and employees, or employers and employees, or between employees or between persons employed and persons seeking employment involving or growing out of a dispute concerning terms, or conditions of employment, unless necessary to prevent irreparable injury to property or a property right of

the party making the application, for which injury there is no adequate remedy at law. The property or property right threatened must be described with particularity in the application, which must be sworn to by the applicant, his agent or attorney. Sec. 20, act October 15, 1914. Secs. 21, 22, 23, 24 and 25 of the above-mentioned act provide for the procedure and punishment of contempt in such cases.

Notice of Motion.

By new rule 73, no preliminary injunction shall be granted without notice to the opposite party, nor any temporary restraining order without notice, unless it shall clearly appear by facts set up in affidavits, or by a verified bill, that immediate and irreparable loss or damage will result before the matter can be heard on notice. If the order is granted without notice, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of order; and for such hearing the case shall have precedence of all other matters except older matters of the same character. Sec. 263 of the Judicial Code (Comp. Stat. 1913, sec. 1240), authorizing the issuing of injunctions on motion without preliminary notice, with or without security, was repealed by Act October 14, 1914, chap. 323, sec. 17, and the following provisions substituted:

1st. No preliminary injunction can be issued without notice.

2d. No temporary restraining order shall be granted without notice unless by affidavits or by verified bill irreparable injury or loss will result if not issued before notice can be served. When the restraining order is issued it must be indorsed with date and hour of issuance, and forthwith filed in the clerk's office, and entered of record. The order shall define the injury anticipated and state why it is irreparable, and why granted without notice, and shall by its terms expire, not to exceed ten days, which the court must indicate in the order. However, for good cause the order may be extended for a like period as fixed by the original order, and the reasons for such extension must be stated and entered of record. See *Thullen v. Triumph Electric Co.* 128 C. C. A. 655, 212 Fed. 143, 145; *Stearns-Roger Mfg. Co. v. Brown*, 52 C. C. A. 559, 114 Fed. 939.

3d. Where a temporary restraining order is granted without

notice, the matter of the issuance of a preliminary injunction shall be set down for hearing at the earliest possible time, and shall take precedence of all matters except older matters of the same character. The party asking the preliminary injunction must proceed when called for hearing at the time fixed, and if he does not, the court must dissolve the temporary injunction.

4th. Upon two days' notice to the party obtaining the restraining order, the opposite party may move a dissolution or modification. The court must determine the motion as expeditiously as the ends of justice require. See new rule 73.

5th. This act does not affect sec. 266 of the Judicial Code.

Where a preliminary injunction is sought to suspend or restrain the enforcement, operation, or execution of any statute of a State, upon the ground of unconstitutionality of such statute, said application shall not be heard or determined before at least five days' notice of the hearing shall be given to the governor and attorney general of the State, and to such other persons as may be defendants in the suit. Judicial Code, sec. 266. The application must be heard at the earliest practicable day after the expiration of the notice, precedence being given to it for hearing.

In *Southwestern Surety Co. v. Wells*, 217 Fed. 295, it is said a motion for a preliminary injunction must be pursued under new rule 29, to be called up and disposed of in the discretion of the court or upon five days' notice.

Enjoining Proceedings in State Courts.

By sec. 265 of the Judicial Code (Comp. Stat. 1913, sec. 1242), an injunction shall not be granted to "stay proceedings" in a State court except in bankruptcy cases. This statute limits the powers of the circuit court in furtherance of a harmonious administration of justice in the two jurisdictions. *Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 475, 476; *Evans v. Gorman*, 115 Fed. 401; *Security Trust Co. v. Union Trust Co.* 134 Fed. 301. In bankruptcy the Federal courts may enjoin taking away property from the trustee. *Re Gutman*, 114 Fed. 1009; *New River Coal & Land Co. v. Ruffner Bros.* 165 Fed. 881-882; *Re Blue Stone Bros.* 174 Fed. 54.

However, we will see further that the limitation does not apply to an injunction issued by the Federal courts in defense of its jurisdiction of a cause of action, when the *res* is in possession of the court. (*Ibid.*); nor to proceedings in the State court after removal. *Williston v. Raymond*, 213 Fed. 528, and cases cited; *Chesapeake & O. R. Co. v. Cockrell*, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 120 C. C. A. 257, 201 Fed. 922, *id.* 134 C. C. A. 386, 218 Fed. 628.

We see that the prohibition is against a "stay of proceedings" in a State court, so our next inquiry will be—

What Are "Proceedings."

Proceedings cover not only the successive steps in the suit up to the entry of judgment, but all process necessary to the full execution of the judgment. *Mills v. Provident Life & T. Co.* 100 Fed. 346, 347; *Phelps v. Mutual Reserve Fund Life Asso.* 112 Fed. 463, 464; *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 136; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1; *Provident Life & T. Co. v. Mills*, 91 Fed. 435; *Security Trust Co. v. Union Trust Co.* 134 Fed. 301.

Section 265 originated in 1793, and is a legislative command that the courts of these two jurisdictions must move within their respective limits, and exercise their respective powers without conflict. The courts have adhered with remarkable consistency to the letter and spirit of the law. It may be, as often declared, that the act was but the declaration of that comity between courts of concurrent jurisdiction, which has always been recognized, but there is no doubt that its mandatory form has been a wholesome restriction upon the Federal courts. It has emphasized the duty to give preference to those methods of procedure which served to conciliate the distinct and independent tribunals of the two systems. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 464, 465; *Evans v. Gorman*, 115 Fed. 401, 402; *Taylor v. Carryl*, 20 How. 597, 15 L. ed. 1032.

When Section 265 of the Judicial Code Does Not Apply.

It does not apply when the court is seeking to maintain its

own jurisdiction over the subject-matter, the possession of which has been first obtained by the court. It is a settled rule of comity that the possession of the *res* vests the court first acquiring the same with the power to hear and determine all controversies relating thereto, and disables the other courts of concurrent jurisdiction from interfering therewith. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 465; *Garner v. Second Nat. Bank*, 16 C. C. A. 86, 33 U. S. App. 91, 67 Fed. 833; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Foster v. Lebanon Springs R. Co.* 100 Fed. 543; *Rodgers v. Pitt*, 96 Fed. 671; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Knott v. Evening Post Co.* 124 Fed. 352; *McDowell v. McCormick*, 57 C. C. A. 401, 121 Fed. 65; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Southern R. Co. v. Simon*, 153 Fed. 234; *Massie v. Buck*, 62 C. C. A. 535, 128 Fed. 27; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782; *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 3; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 24; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 6, 7. And the rule is not restricted in its application to property actually seized, but appears as well when suits are brought to *enforce liens*, to marshal assets, administer trusts, or liquidate insolvent estates, or whenever the suits is of such a character that the court may in its progress be compelled to assume possession of the property to be affected. *Ibid.*; *Merritt v. American Steel Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 231; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 680; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Marks v. Marks*, 75 Fed. 333; *Shields v. Coleman*, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; *Owens v. Ohio C. R. Co.* 20 Fed. 12, 13; *Appleton Waterworks Co. v. Central Trust Co.* 35 C. C. A. 302, 93 Fed. 289. Nor is it restricted to protecting its own *prior* jurisdiction, but the Federal court may enjoin when necessary to

protect its decree. *Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 471-477; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782.

Nor does this section affect the right of the Federal court to restrain a judgment of a State court obtained by fraud. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 465 and cases cited; *Wood v. Davis*, 108 Fed. 130; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 807, and cases cited; *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Marshall v. Holmes*, 141 U. S. 590, 35 L. ed. 871, 12 Sup. Ct. Rep. 62; *Bailey v. Willeford*, 126 Fed. 806, 807; *United States v. Beebe*, 34 C. C. A. 321, 92 Fed. 244; *United States v. Throckmorton*, 98 U. S. 68, 25 L. ed. 96. See "Bill of Revivor for Fraud." Nor when a judgment is obtained in a State court by collusion, conspiracy, or false swearing. *Ritchie v. Sayers*, 100 Fed. 533; *Braxton v. Rich*, 47 Fed. 178; *Perry v. Johnston*, 95 Fed. 325; *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 350; *Holton v. Davis*, 47 C. C. A. 246, 108 Fed. 150, 151. Nor when the judgment has been obtained without service (*Cooper v. Newell*, 173 U. S. 556, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; *Hekking v. Pfaff*, 43 L.R.A. 618, 33 C. C. A. 328, 50 U. S. App. 484, 91 Fed. 60), or jurisdiction (*Phoenix Bridge Co. v. Castleberry*, 65 C. C. A. 481, 131 Fed. 177, 178); or when it is otherwise void (*Harrison v. Lokey*, 26 Tex. Civ. App. 404, 63 S. W. 1030); and State courts may thus attack Federal judgments. *Ralston v. Sharon*, 51 Fed. 707; *League v. Scott*, 25 Tex. Civ. App. 318, 61 S. W. 521. See *Central Nat. Bank v. Stevens*, 169 U. S. 463, 42 L. ed. 818, 18 Sup. Ct. Rep. 403.

Federal courts may allow an equitable set-off against State judgments. *Northwestern Port Huron Co. v. Babcock*, — C. C. A. —, 223 Fed. 486.

When Jurisdiction Attaches.

While the rule that the court obtaining possession of the subject-matter prior in point of time cannot be interfered with, yet the issue as to when the jurisdiction attached has often arisen. *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Merritt v. American Steel Barge Co.* 79

Fed. 231, 24 C. C. A. 530, 49 U. S. App. 85. In testing this, the Federal courts have held that jurisdiction does not attach except on the service of process, and the rule is not controlled by State statutes. *United States v. Eisenbeis*, 50 C. C. A. 179, 112 Fed. 196; *Benoist v. Smith*, 191 Fed. 514 and cases cited.

In *Owens v. Ohio C. R. Co.* 20 Fed. 10, it is said that the jurisdiction of the court attaches on the service of process. *Rodgers v. Pitt*, 96 Fed. 673; *Union Mut. L. Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. 443; *Hughes v. Green*, 28 C. C. A. 537, 56 U. S. App. 56, 84 Fed. 833; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Colston v. Southern Home Bldg. & L. Asso.* 99 Fed. 309. In *Rodgers v. Pitt*, 96 Fed. 673, it is said that jurisdiction of a cause does not attach, within the meaning of the general rule, by filing the complaint and issuance of summons, but attaches only on the service of process, and the court whose process is first served holds the cause. *Ibid.* and cases cited; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Shields v. Coleman*, 157 U. S. 177, 178, 39 L. ed. 663, 664, 15 Sup. Ct. Rep. 570; *United States v. American Lumber Co.* 80 Fed. 315.

There is no question that process which first seizes and holds property and brings it within the dominion of the court gives to that court exclusive jurisdiction. *Vowinkel v. N. Clark & Sons*, 62 Fed. 992, 993; *Robinson v. Mutual Reserve L. Ins. Co.* 162 Fed. 794; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Royal Trust Co. v. Washburn, B. & I. R. Co.* 71 C. C. A. 579, 139 Fed. 865; *Cooper v. Reynolds*, 10 Wall. 317, 19 L. ed. 932; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 967; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 931; *Kelly, M. & Co. v. Sioux Nat. Bank*, 81 Fed. 4. But in suits for foreclosure of liens, or when the suit is substantially *in rem*, and by the allegations of the bill the dominion over the subject-matter is contemplated, and necessary to a proper decree, then a suit in equity is begun by filing the bill. *Louisville Trust Co. v. Knott*, 65 C. C. A. 158, 130 Fed. 825; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Mound City Co. v. Castleman*, 177 Fed. 510; *Merritt v. American Steel Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed.

231; Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294-301, 28 L. ed. 729-731, 5 Sup. Ct. Rep. 135; Harding v. Corn Products Ref. Co. 94 C. C. A. 144, 168 Fed. 659; Appleton Waterworks Co. v. Central Trust Co. 35 C. C. A. 302, 93 Fed. 286-288. See Humane Bit Co. v. Barnet, 117 Fed. 318, holding a suit in equity is begun by filing bill, following Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564, but as between the parties in a proceeding *in rem*, when process issued. The Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. *supra*, was a foreclosure of a mortgage in the Federal court; the defendant filed a bill in the State court and sought to enjoin proceedings in the Federal court. The bill had been first filed in the Federal court, but process from the State court had been first served. The court says filing the bill in the Federal court gave jurisdiction to this court first, and it was not controlled by the service of process. *Ibid.* The filing of the bill and the *bona fide* issue of process is sufficient. Equity rule 11. The court says the rule as stated is of special importance in its application to Federal and State courts; and, in applying the doctrine of *lis pendens* to the case of a third person who is a bona fide purchaser, notice is held to begin from date of service of process, and not from filing the bill.

Ne Exeat.

Section 261 of the Judicial Code (Comp. Stat. 1913, sec. 1238), authorizes the issuing of this writ. I have already referred to the prayer for this writ in chap. 47, p. 284.

A form for the writ will be found in *Griswold v. Hazard*, 141 U. S. 263, 35 L. ed. 681, 11 Sup. Ct. Rep. 972, 999, and it will be seen that it is designed to prevent a defendant against whom an indebtedness is alleged from going beyond the jurisdiction of the court in which the suit is pending, and to secure which sufficient bail or security is required of the defendant, or to be imprisoned in case of refusal to give it.

A party arrested upon *ne exeat* may obtain a discharge of the writ upon motion or petition, upon defendant's giving security to answer the bill and to render himself amenable to process during the pendency of the suit, and to such process as may be

issued to compel a performance of the decree. *Griswold v. Hazard*, 141 U. S. 281, 35 L. ed. 687, 11 Sup. Ct. Rep. 972, 999.

The writ is in force, when issued, until the judgment is satisfied, or property security given, or is some way discharged by the court (*Lewis v. Shainwald*, 48 Fed. 500; *McNamara v. Dwyer*, 7 Paige, 239, 32 Am. Dec. 631), and it seems that the writ may, after judgment, be issued upon motion or petition, though there was no prayer in the bill asking it. *Ibid.*; 14 Am. Dec. 561, note; *Lewis v. Shainwald*, 48 Fed. 500; U. S. Rev. Stat. sec. 717, U. S. Comp. Stat. 1901, p. 580.

It is not of itself a remedy, but a means to effectuate a remedy, *viz.*, by keeping a party within the jurisdiction of the court. *Shainwald v. Lewis*, 69 Fed. 496, 497; *Re Cohen*, 136 Fed. 999; *Gooding v. Reid, M. & Co.* 101 C. C. A. 310, 177 Fed. 684. The old law is embodied in sec. 261 of the New Code. *Gooding v. Reid, M. & Co.* 101 C. C. A. 310, 177 Fed. 684.
S. Eq.—31.

CHAPTER LXXVII.

AUXILIARY SUITS.

All interventions, bills of revivor, supplemental bills, and bills for injunctive relief pending a suit are auxiliary bills in equity. The object and effect of filing these bills have been already discussed, and I now propose only to speak of auxiliary bills generally.

All bills growing out of or connected with a pending suit are called auxiliary or ancillary suits in equity. *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 652; *McDonald v. Seligman*, 81 Fed. 753; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *Hobbs Mfg. Co. v. Gooding*, 164 Fed. 93; *Cooper v. Newton*, 160 Fed. 190; *Brown v. Allebach*, 156 Fed. 697; *O'Connor v. O'Connor*, 146 Fed. 994; *King v. Buskirk*, 24 C. C. A. 82, 42 U. S. App. 249, 78 Fed. 233-235. The jurisdiction of the main suit supports the auxiliary bill. *Ross v. Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 471; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 660; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 642; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Everette v. Independent School Dist.* 102 Fed. 530; *Carey v. Houston & T. C. R. Co.* 161 U. S. 133, 40 L. ed. 644, 16 Sup. Ct. Rep. 537. But such bill must, both in a proper and legal sense, be an ancillary bill; it must, in fact, be only a continuation of the original suit, that is, it must relate to some matter already litigated by the same parties or their representatives. If the bill contains matter not before litigated by the same parties standing in the same interests, that is, if new parties are brought in, and new matter charged as a basis of relief, then the bill is not an ancillary, but original bill, and cannot be supported by the former suit, but must stand independently on its parties and subject-matter for jurisdiction in the Federal courts. *Union Cent. L. Ins. Co. v. Phillips*,

41 C. C. A. 263, 102 Fed. 19; Anglo-Florida Phosphate Co. v. McKibben, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529; Raphael v. Trask, 118 Fed. 777; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Shinney v. North American Sav. Loan & Bldg. Co. 97 Fed. 9.

We have the most frequent illustrations of these ancillary bills, which are brought to restrain or regulate judgments recovered in law or equity. Leigh v. Kewanee Mfg. Co. 127 Fed. 990; South Penn Oil Co. v. Calf Creek Oil & Gas Co. 140 Fed. 508; Broadis v. Broadis, 86 Fed. 951; Freeman v. Howe, 24 How. 460, 16 L. ed. 752; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 3; Bradshaw v. Miners' Bank, 26 C. C. A. 673, 53 U. S. App. 399, 81 Fed. 902. So bills to revive a judgment. Wanderly v. Lafayette County, 77 Fed. 665. Or set aside a decree. Carey v. Houston & T. C. R. Co. 161 U. S. 128, 40 L. ed. 643, 16 Sup. Ct. Rep. 537; Symmes v. Union Trust Co. 60 Fed. 553. Or to modify or correct it. Thompson v. Schenectady Co. 124 Fed. 274. Or to obtain the enforcement or construction of a former decree. Jenks v. Brewster, 96 Fed. 625. So all bills filed by receivers to protect property or remove cloud. Connor v. Alligator Lumber Co. 98 Fed. 155; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279-280; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 578, 43 L. ed. 817, 19 Sup. Ct. Rep. 500; Brookfield v. Hecker, 118 Fed. 942; Bausman v. Denny, 73 Fed. 69. Or suits brought against the receivers touching the property in their possession. Shinney v. North American Sav. Loan & Bldg. Co. 97 Fed. 9; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Washington v. Northern P. R. Co. 75 Fed. 333; Sullivan v. Barnard, 81 Fed. 886; Carpenter v. Northern P. R. Co. 75 Fed. 850; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642. Or in any case, as heretofore shown, where the court takes possession of property or a fund for distribution, and wherein all bills filed by those claiming an interest are auxiliary; and the jurisdiction is not affected because the

question involved may be of a legal nature. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *St. Louis & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 195, note; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 643; *Osborn & Co. v. Barge*, 30 Fed. 805; see *Whalen v. Enterprise Transp. Co.* 164 Fed. 96; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018. So in matters of injunctive relief that becomes necessary during the pendency of a cause in equity or law; bills filed in aid of such suits to preserve property, or the status of parties and subject-matter, are auxiliary. *South Penn Oil Co. v. Calf Creek Oil & Gas Co.* 140 Fed. 508; *Hill v. Kuhlman*, 31 C. C. A. 87, 59 U. S. App. 82, 87 Fed. 498; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 3; *Freeman v. Howe*, 24 How. 460, 16 L. ed. 752; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750; *Jones v. Andrews*, 10 Wall. 333, 19 L. ed. 937; *West v. East Coast R. Co.* 51 C. C. A. 426, 113 Fed. 742.

I cannot possibly cover by illustration the field when and where these auxiliary bills are appropriate, so I will conclude by calling attention to the distinguishing features of these bills from original bills in Federal courts.

First. As to the citizenship of the parties, and other matters affecting the jurisdiction of Federal courts.

Second. As to the service of process when auxiliary bills are filed.

First. These bills can be filed and maintained in the Federal courts, though the court would not have jurisdiction of them as original bills (*Rice v. Durham Water Co.* 91 Fed. 433; *American Surety Co. v. Lawrenceville Cement Co.* 96 Fed. 25; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 652 and cases cited; *Milwaukee & M. R. Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859; *Osborn & Co. v. Barge*, 30 Fed. 805; *First Nat. Bank v. Salem Capital Flour-Mills Co.* 31 Fed. 580; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 96), because neither diverse citizenship, residence, or amount, nor value of subject-matter, as required under the general judiciary act, are necessary to appear to support the jurisdiction (*Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497; *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 16 U. S.

App. 115, 57 Fed. 753; *Park v. New York*, L. E. & W. R. Co. 70 Fed. 643; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; *Lilienthal v. McCormick*, 54 C. C. A. 75, 117 Fed. 96; *Ames Realty Co. v. Big Indian Min. Co.* 146 Fed. 179; *Newton v. Gage*, 155 Fed. 604; *Ulman v. Jaeger*, 155 Fed. 1011; *Craig v. Dorr*, 76 C. C. A. 559, 145 Fed. 311; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Widaman v. Hubbard*, 88 Fed. 812; *Re Tyler*, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785).

Substituted Service.

Second. As to service of process in auxiliary bills, equity rule 13 requires that the service of all subpoenas shall be by delivering a copy to the defendant personally, or leaving a copy at the dwelling house or usual place of abode; but notwithstanding this rule and equity rules 14, 15, it is now well settled that in all classes of proceedings of an auxiliary character the service of process may be made by what is called *substituted service*.

Every departure from the rule governing service of process as provided in equity rule 13, and by which other methods are provided for obtaining jurisdiction over parties, is substituted service. *Boswell v. Otis*, 9 How. 350, 13 L. ed. 170. Thus, service on the agent or attorneys of the parties to the suit, in lieu of the service on the parties themselves, when permitted, is substituted service. *Ibid.* There must be an *order* for this service. *Pacific R. Co. v. Missouri P. R. Co.* 1 McCrary, 647, 3 Fed. 772; *Gregory v. Pike*, 25 C. C. A. 48, 50 U. S. App. 4, 36 C. C. A. 299, 94 Fed. 373, 79 Fed. 520. So the service authorized by section 8 of the act of 1875, providing for special process to be sent beyond the limits of the State, or by publication, is a form of substituted service. *Forsyth v. Pierson*, 9 Fed. 801.

On Agents.

Service on agents or attorneys of parties is not known to equity on original bills, but applies to auxiliary bills, and such

bills as are in fact continuations of the original suit (Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80; Fidelity Trust & S. V. Co. v. Mobile Street R. Co. 53 Fed. 851).

The relief sought must be germane to the suit, and not under new facts not in the original bill, in order to support substituted service (*ibid.*), as ancillary bills of an original nature must be served as original bills (Gregory v. Pike, 25 C. C. A. 48, 47 U. S. App. 4, 79 Fed. 521, and cases cited; Smith v. Woolfolk, 115 U. S. 143, 29 L. ed. 357, 5 Sup. Ct. Rep. 1177; Manning v. Berdan, 132 Fed. 382; Bowen v. Christian, 16 Fed. 729; Providence Rubber Co. v. Goodyear, 9 Wall. 810, 19 L. ed. 589; Shainwald v. Davids, 69 Fed. 702).

Its use has been permitted in injunctions to restrain or in aid of actions at law; and in all these instances the attorney representing the defendant in the bill, who had conducted the action at law, is a recognized agent upon whom the service can be made. Abraham v. North German F. Ins. Co. 3 L.R.A. 188, 37 Fed. 731; Cortes Co. v. Thannhauser, 20 Blatchf. 59, 9 Fed. 227; Bartlett v. Sultan of Turkey, 19 Fed. 346; Paine v. Warren, 33 Fed. 358.

To illustrate: An action at law is brought on a policy of insurance, but it is discovered that a reformation is necessary, for which you must file a bill in equity; in such case you may serve the attorney of the defendant in the common-law suit by delivering the subpœna to him. 37 Fed. 731, *supra*.

Persons belonging to a class represented in a suit, who are regarded as *quasi* parties, may have service on the attorney of nonresident parties, if they should file a petition in a suit to protect themselves. Fidelity Trust & S. V. Co. v. Mobile Street Co. 53 Fed. 851; Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80. Substituted service is sometimes allowed on a party who has absconded to avoid service, or who conceals himself, but has a legal and acknowledged representative or general agent in the jurisdiction of the court. Shainwald v. Davids, 69 Fed. 702.

Character of Attorney on Whom Service Made.

If the attorney is not a general agent of the party to be

served, then the service is not good (*Shainwald v. Davids*, supra; *Bowen v. Christian*, 16 Fed. 730; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 228; *Brown v. Arnold*, 127 Fed. 390; *Pike v. Gregory*, 36 C. C. A. 299, 94 Fed. 374; *Smith v. Woolfolk*, 115 U. S. 143-150, 29 L. ed. 357-360, 5 Sup. Ct. Rep. 1177); and the bill must not contain such new facts or prayer for relief as would destroy the presumption that the attorney on whom the service was made was authorized to represent the respondent in the cross bill. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851. *Bowen v. Christian*, 16 Fed. 729.

How Substituted Service Obtained.

This character of service can only be made on application to the court and upon an order by the court granting leave to serve the attorney or agent; if not based on an order of court, it is void. *Pacific R. Co. v. Missouri P. R. Co.* 1 McCrary, 647, 3 Fed. 772; *Pike v. Gregory*, 36 C. C. A. 299, 94 Fed. 373, 374, S. C. 25 C. C. A. 48, 50 U. S. App. 4, 79 Fed. 520; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851; *Gage v. Riverside Trust Co.* 156 Fed. 1002. The order to make the service is granted on motion filed for that purpose, and the motion must be based on some legal or equitable merit, as shown in your auxiliary bill (*Muhlenburg County v. Citizens' Nat. Bank*, 65 Fed. 537), and the circumstances rendering such service necessary must be clearly stated (*Ibid.*; *Shainwald v. Davids*, 69 Fed. 702, 703; *Oglesby v. Attrill*, 14 Fed. 214).

The application for substituted service may be stated in the bill or by motion setting up the facts upon which substituted service will be granted, and whether in the bill, or otherwise, should be as follows:

Complainant shows that the said C. D., defendant, is a resident of New Orleans and citizen of the State of, and is not an inhabitant and citizen of the district of, where this suit is brought, and cannot be found therein so as to be served with process and summons to appear as defendant in this suit; and complainant shows that the said C. D. has an attorney appearing for him in this suit and sundry other suits brought by the said C. D. concerning the matter in controversy, some of which are still pending, namely, Charles Smith, Esq., of this city.

Wherefore the complainant A. B. prays that this court may order that notice of this suit and a summons to appear therein may be served on said Charles Smith, Esq., and that such notice being thus duly served may be held to be notice of this suit duly served on the defendant C. D.

The form as above given is only the general frame work of the application. If the substituted service is sought of a cross bill, or in an injunction proceeding, or in any auxiliary suit, or in whatever proceeding, your bill or your motion must show that it is a proceeding in which substituted service is permitted, and that the circumstances exist which render such service necessary. Constructive service on nonresidents has already been discussed and forms given.

Motion to Vacate.

If there is any ground upon which a motion to vacate the substituted service can be made, you should file it at once, and you may use the following form:

Title as in bill.

And now comes C. D., defendant in this cause, and not admitting the jurisdiction of the court in or over the above entitled cause, and for the purpose of objecting to the exercise of this court of any such jurisdiction, comes and moves the court that the writ of subpoena issued out of the clerk's office of said court on the.....day of....., A. D. 19..., which has not been served on him as the law requires, may be quashed and that said cause may be dismissed by the court for want of jurisdiction of the same.

By Charles Smith, his solicitor, who appears specially for the purpose of raising the question of jurisdiction, and that alone.

Charles Smith,
Solicitor for C. D.

Pike v. Gregory, 36 C. C. A. 299, 94 Fed. 374.

Be careful in this motion that you do not put in issue any other fact than that which asserts jurisdiction, or you waive the service.

Interpleader.

A bill of interpleader is filed by one who has the possession, but no interest in the subject-matter of the suit. It seeks the

instruction of the court as to whom the fund or property in possession should be delivered as between contesting litigants. *Bolin v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 61 S. W. 444. In *Groves v. Sentell*, 153 U. S. 485, 38 L. ed. 785, 14 Sup. Ct. Rep. 898, it is said: The general rule is that a party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, strictly so called; in fact, perfect disinterestedness is an essential ingredient of such bill, citing *Killian v. Ebbinghaus*, 110 U. S. 568-572, 28 L. ed. 246-248, 4 Sup. Ct. Rep. 232, which declares that a bill of interpleader must aver that petitioner has no interest in the subject-matter of the suit, must admit title in claimants, and aver indifference between them, and cannot seek relief against either. *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 841; *Pusey & J. Co. v. Miller*, 61 Fed. 401; *Penn Mut. L. Ins. Co. v. Union Trust Co.* 83 Fed. 891; see *Provident Sav. Life Assur. Soc. v. Loeb*, 115 Fed. 359; and *McNamara v. Provident Sav. Life Assur. Soc.* 52 C. C. A. 530, 114 Fed. 912-914; *Stevens v. Germania L. Ins. Co.* 26 Tex. Civ. App. 153, 62 S. W. 826; *Jackson & S. Co. v. Pearson*, 60 Fed. 123; *Hayward v. McDonald*, 113 C. C. A. 368, 192 Fed. 891, and cases cited.

Bill in Nature of Interpleader.

There has been recognized in *Groves v. Sentell*, 153 U. S. 485, 38 L. ed. 792, 14 Sup. Ct. Rep. 898, and many other cases, a bill in the nature of a bill of interpleader when complainant sets up, as between the conflicting interests of parties to the suit, an interest for which equitable relief is sought. *Ibid.*; *McNamara v. Provident Sav. Life Assur. Soc.* 52 C. C. A. 530, 114 Fed. 912; *Lockett v. Rumbaugh*, 45 Fed. 32 and cases cited; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 844, 845. But when a complainant in a bill of interpleader has acquired an interest from two adverse claimants, his bill of interpleader cannot be sustained. *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 840-842.

CHAPTER LXXVIII.

EVIDENCE IN EQUITY SUITS.

Statutes and Rules Controlling the Taking of Evidence in Equity Suits.

U. S. Rev. Stat. sec. 862 (Comp. Stat. 1913, sec. 1470), provides that the mode of proof in causes in equity shall be according to the rules now or hereafter provided by the Supreme Court. U. S. Rev. Stat. sec. 917 (Comp. Stat. 1913, sec. 1543), provides that the Supreme Court shall have power to prescribe from time to time, and in a manner not in conflict with any law of the United States, the mode and manner of taking evidence and obtaining discovery in suits in equity. Under this power the Supreme Court has promulgated its rules providing for the manner of taking testimony in equity causes.

In 1912 the Supreme Court promulgated a system of new rules which went into effect January 1st, 1913, which radically changed the mode and manner of taking evidence in equity cases. Under the old system the trial by the court of equity cases was upon the record, consisting of the pleadings, depositions and instruments in writing; and the taking of any evidence orally was an exception, which might have been permitted in the discretion of the court upon application. By the new rules the taking of depositions to support the issues is now made the exception, and in the trial the testimony of the witnesses must be taken in open court orally, as in trials at law, except as otherwise provided by the statutes or the new rules. *Sheeler v. Alexander*, 211 Fed. 545. New rule 46 provides that the testimony of witnesses shall be taken in open court except as otherwise provided by the statutes and these rules. The court shall pass upon the evidence as in actions at law.

By new rule 47 the court upon application by either party, when allowed by statute, or for good and exceptional cause for

departing from the general rule (as stated above), to be shown by affidavit, may permit the depositions of named witnesses to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer upon the notice and terms specified in the order. Every deposition taken under the statutes or under any such order of the court shall be taken and filed as follows, unless otherwise ordered by the court for good cause shown:

1st. Those of the plaintiff within sixty days from the time the cause is at issue.

2d. Those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions.

3d. Rebutting depositions by either party within twenty days after time for taking original deposition expires. (See rule 48 as to time of taking expert testimony.) Counsel by consent may extend the time for taking testimony. *Fortney v. Carter*, 121 C. C. A. 514, 203 Fed. 454. By equity rule 54, depositions under the United States Statutes, secs. 863, 865, 866, 867 (Comp. Stat. 1913, secs. 1472, 1474, 1477, 1478), may be taken after the cause is at issue, and by rule 31 the cause is at issue when the answer is filed, whether it specifically denies or sets up new matter, except a set-off or counterclaim to which a reply must be made to put them in issue. Rule 47 as to time of taking applies to these statutes: *Victor Talking Machine Co. v. Sonora Phonograph Corp.* 221 Fed. 678. Referring to the United Statutes, sec. 863 provides for depositions *de bene esse*, sec. 865 provides for the transmission of depositions when taken *de bene esse*. Sec. 866 provides for taking depositions under a *dedimus potestatem* and *in perpetuam*. Sec. 875 provides for taking testimony of a foreign witness by letters rogatory.

March 9, 1892, Congress passed the following act (Comp. Stat. 1913, sec. 1476): That in addition to the mode of taking depositions in causes in the district courts of the United States, it shall be lawful to take depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. 27 Stat. at L. p. 7, chap. 14; *Shellabarger v. Oliver*, 64 Fed. 306; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *International Tooth-Crown Co. v. Hank's Dental Asso.* 101 Fed. 306; *Ex parte Fisk*, 113 U. S. 723, 28 L. ed. 1121, 5

Sup. Ct. Rep. 724; Batts's Rev. Stat. (Tex.) 2273 to 2298. This act was only cumulative. *United States v. Fifty Boxes*, 92 Fed. 601; *Carrara Paint Agency Co. v. Carrara Paint Co.* 137 Fed. 319; *Smith v. International Mercantile Co.* 154 Fed. 786; *National Cash-Register Co. v. Leland*, 77 Fed. 242; *McLennan v. Kansas City, St. J. & C. B. R. Co.* 22 Fed. 198.

All of which methods will be hereinafter discussed.

Who May Be Examined as Witnesses.

By act of Congress June, 1906, the law of the State in which the court is held shall be the rule as to the competency of witnesses. Sec. 858 U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1464) was amended.

By rule 48 in cases involving the validity and scope of a patent or trademark, the court may upon petition order the testimony in chief of expert witnesses when directed to matters of opinion, to be set forth in affidavits, and to be filed by the plaintiff within forty days after issue; and by the defendant within twenty days after the expiration of plaintiff's time, and fifteen days after the expiration of the time for original affidavits. See *Fortney v. Carter*, 121 C. C. A. 514, 203 Fed. 454.

Who to Issue the Commission.

We have seen by rule 54 that depositions taken under the statutes of the United States must be taken in the manner provided by such statutes, and those taken under State laws as provided by such laws, in all of which the clerk of the court issues the commission, and it is issued as of course when the statute is complied with. Rule 47, however, prescribes a specific time within which the parties must take and return the depositions, as we have before seen, whether taken by order of the court or under a statute. Again, we have seen by rule 47 that the requirement of rule 46 that testimony in an equity case shall be taken orally in open court is to be considered hereafter the general rule; but that on the application of either party, taking testimony under a statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, the party applying may be permitted to take the evidence before an

examiner or other named officer upon the notice and terms specified in the order. In such cases the order of the court would be by the authority of the officer to take and return the depositions within the time required by the court.

Before Whom Taken.

We have seen by rule 47 the evidence before an examiner or other named officer may be ordered by the court, which will be discussed hereafter.

If taken according to State practice, the depositions may be taken before any clerk of a district court, any judge or clerk of a county court, or any notary public in his proper county, if taken in the State. If taken out of the State, and within the United States, they may be taken before any clerk of a court of record having a seal, any notary public (U. S. Rev. Stat. sec. 863, Comp. Stat. 1913, sec. 1472), or any commissioner of deeds duly appointed under the State law for some other State or Territory. If taken out of the United States, the depositions may be taken before any notary public or any minister, commissioner, or *charge d'affaires* of the United States resident in and accredited to the country where taken, or any consul general, consul, viceconsul, commercial agent, vicecommercial agent, deputy consul, or consular agent of the United States resident in such country.

In the Federal court, by equity rules 47 and 52, the depositions are taken before the commissioner named by the court, or before an examiner of the court, or a special examiner *pro hac vice*, or on commission before an officer authorized to take depositions.

By U. S. Rev. Stat. sec. 863, when depositions are taken *de bene esse*, they may be taken before any judge of a court of the United States, or any commissioner of a United States circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme court or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney of either of the parties, or interested in the result of the cause. *Bird v. Halsy*, 87 Fed. 677.

In the supplement to U. S. Rev. Stat. of 1874, vol. 1, p. 251, it is provided that notaries public of the several States and Territories and the District of Columbia are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, as well as affidavits and acknowledgments, in the same manner and with the same effect, as a commissioner of a United States circuit court may now lawfully take or do. Act August 15, 1876. As to powers of the circuit court commissioners, see *United States v. Hom Hing*, 48 Fed. 638, note.

So depositions may be taken by a notary, under a commission addressed to any officer authorized to take depositions, whether taken *de bene esse*, or in the ordinary form. By act of May 15, 1893, witnesses may be examined before the court, who must preserve the evidence to be incorporated in the record.

In foreign countries depositions may be taken, under the Federal statutes, before a secretary of legation or consular officer. U. S. Rev. Stat. sec. 1750 (Comp. Stat. 1913, sec. 3211); see *Depositions to Foreign Countries*; *Stein v. Bowman*, 13 Pet. 218, 10 L. ed. 133; U. S. Rev. Stat. sec. 2157 (Comp. Stat. 1913, sec. 4160), as to taking depositions in the Indian country; also see 1 U. S. Rev. Stat. Supp. p. 251.

How Witnesses Are Brought Before a Commissioner, Examiner, or Master, and Made to Testify.

United States Revised Statutes, sec. 868 (Comp. Stat. 1913, sec. 1479), provides that when a commission issues from any United States court to take the testimony of a witness named therein at any place within any district or Territory, the clerk of *any* court of the United States in such district or Territory shall, on the application of either party, issue a subpoena for such witness, requiring him to appear and testify before the commissioner named in the commission; and if such witness refuses or neglects to appear, or appearing, refuses to testify, then the judge of the court whose clerk issues the subpoena may punish the disobedience by contempt proceedings.

By new rule 52, which is substantially the same as old rule 78, it is provided that witnesses who live within the district

may, upon due notice to the opposite party, be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in *any* cause, by subpoena, in the usual form, which may be issued in blank and filled up by the party praying for the same, or by the commissioner, master, or examiner. If any witness shall refuse to appear or give evidence, it shall be deemed a contempt, which when certified to the clerk's office issuing the subpoena, an attachment may issue thereon by order of the court or any judge thereof.

By U. S. Rev. Stat. sec. 863 (Comp. Stat. 1913, sec. 1472), it is provided that any person may be compelled to appear and testify when the testimony is taken *de bene esse*, in the same manner as witnesses may be compelled to appear and testify in court. *Tomlinson v. Moore*, 189 Fed. 845.

By new rule 52 it is provided that if any witness refuses to appear or give evidence, it shall be deemed a contempt of court, which, being certified to the clerk's office by the commissioner, master, or examiner an attachment may issue thereon by order of the court. U. S. Rev. Stat. secs. 863-868, given above. *Zych v. American Car & Foundry Co.* 127 Fed. 723; *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324, 325; *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521. See *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 843.

United States Revised Statutes, sec. 869 (Comp. Stat. 1913, sec. 1480), requires attendance of witnesses under a subpoena *duces tecum*, and compels obedience by the process of contempt. Except that it is provided by U. S. Rev. Stat. sec. 870, that no witness shall be required under the provisions of U. S. Rev. Stat. secs. 868 and 869, to attend at any place out of the county of his residence, nor more than forty miles from the place of his residence; nor is a witness guilty of contempt under either of these sections, unless his fee for going to, returning from, and one day's attendance at the place of examination is paid or tendered him at the time of the service of the citation. *Tomlinson v. Moore*, *supra*.

Section 871 provides for taking the testimony of a witness found within the District of Columbia, to be used in a suit de-

pending in any State, Territory, or foreign court, and by sec. 873 a refusal to appear is punished as a refusal to testify before a court on a trial of the suit.

Subpœnas for Witnesses in Equity Suits.

We have seen by new rule 46 that in all trials in equity the testimony of witnesses must be taken orally unless otherwise provided. By U. S. Rev. Stat. sec. 876 (Comp. Stat. 1913, sec. 1487), subpœnas may run into any other district than that in which the court is held, provided the witness does not live at a greater distance than 100 miles from the place of trial. *Meyer v. Consolidated Ice Co.* 163 Fed. 400; *Smith v. Chicago & N. W. R. Co.* 38 Fed. 322. See Rev. Stat. sec. 877, Comp. Stat. 1913, sec. 1488.

If living more than 100 miles his deposition must be taken. See Depositions "De Bene Esse."

By act of Congress October 15, 1914, chap. 323, sec. 13, governing "monopolies and combinations in trade," it is provided that in any suit brought by the United States on any case arising under the anti-trust laws subpœnas for witnesses may run into any other district, provided no subpœna can issue for witnesses living out of the district in which the court is held, at a greater distance than 100 miles from the place of holding the court, without the permission of the trial court being first had on proper application and cause shown.

CHAPTER LXXIX.

EVIDENCE IN EQUITY SUITS (CONTINUED.)

Having thus seen the conditions under which commissions to take testimony in equity causes are issued, who may be witnesses, and the means of enforcing their attendance and testifying, I will, before discussing the different methods of taking the testimony by commission on interrogatories attached, by oral examination, and by examination in open court at the final hearing, state the statute and rules controlling

- (a) The time to begin taking testimony, and—
- (b) The time in which it must be taken.

The Time to Begin.

We have seen that new rule No. 46 contemplates that the evidence in equity causes must be given orally in open court at the final trial of the cause, and is not to be taken before the final hearing, by deposition, as is now the rule in lawsuits. We have seen that the taking of depositions can only be permitted in exceptional cases and when authorized by act of Congress.

When depositions are to be taken, either in exceptional cases provided by rule 47, or under acts of Congress under rule 54, those of the plaintiff must be filed within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time of filing the plaintiff's deposition, and rebutting depositions by either party within twenty days after the time for taking original depositions expire, unless otherwise ordered by the court or judge for good cause shown. Rule 47.

Rule 54 simply provides that depositions *de bene esse* and under a *dedimus protestatem* and *in perpetuam* may be taken after the cause is at issue. U. S. Rev. Stat. secs. 863–866 (Comp. Stat. secs. 1472–1474, 1477). But a further provision

is added to this rule, that whenever depositions are taken under these statutes, if no notice is given to the adverse party of the time and place of taking the deposition, he shall on motion and affidavit of the fact be entitled to a cross-examination of the witness, either under a commission or by a new deposition, if a court or a judge thereof shall under the circumstances permit it. There is no doubt of the general rule that depositions in equity cannot be taken until after the cause is at issue. *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 377; *Stevens v. Missouri, K. & T. R. Co.* 104 Fed. 936. There are, however, conditions when the enforcement of the rule will lead to injustice and therefore create exceptions, which have been recognized by the Supreme Court in promulgating equity rule 58.

Depositions May Be Taken Before Issue Joined.

By equity rule 58 the plaintiff at any time after filing the bill, and not later than twenty-one days after joining issue, and the defendant after filing his answer, and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the purpose of discovery, by the opposite party or parties, of facts and document material to the support or defense of a cause, noting which of the interrogatories each of the parties interrogated must answer; provided no party, unless by order of the court, shall file more than one set of interrogatories. The rule further provides that in case of corporation parties the interrogatories may be required to be answered by any officer of the corporation. (See "Discovery" for discussion of the rule.) To support the taking of depositions before issue joined in equity, I am aware that section 863 has been held to refer to taking depositions only after issue joined, as stated in *Flower v. MacGinniss* and *Stevens v. Missouri, K. & T. R. Co.* supra. See *Frost v. Barber*, 173 Fed. 847, and cases cited. It will be seen that section 863 does not indicate by its provisions the time in which depositions *de bene esse*, i. e., provisionally, can be taken, but inferentially it is indicated in the conditions under which they are permitted. Thus a witness bound on a journey beyond the reach of the court's process, or when ancient and infirm, clearly indicates that he may be

examined under this section before issue joined, see *Richter v. Jerome*, 25 Fed. 679; *Lowrey v. Kusworm*, 66 Fed. 539; so it is indicated when provision is made for notice of taking when the defendant is absent, and has no attorney of record. Again, it is provided that depositions may be taken in any civil cause depending in a circuit court; which means after the bill is filed.

Section 863 was intended to provide a method of examining witnesses before the trial of a common-law case, and at any time between filing the suit and its trial, if the conditions stated rendered it urgent. Clearly, when the conditions exist, it would present a good and exceptional cause, under rule 47, to order the depositions taken.

Again, in section 866 of the United States Revised Statutes, (Comp. Stat. 1913, sec. 1477), it is provided that any circuit court of the United States as a court of equity may direct depositions to be taken *in rei memoriam*, or any of the courts of the United States may grant a *dedimus protestatem* to take depositions, if necessary to prevent a failure or delay of justice. Depositions may be taken under this section whenever it may appear to the court that it is necessary to prevent a delay of justice, whether the application to the court be before or after issue joined. An abuse of the statute by instituting inquisitorial proceedings under it is guarded against by requiring an order of the court. *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 378; *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 994.

Again, by section 867, it is provided that any court of the United States may admit in evidence in any cause, depositions taken *in rei memoriam*, which would be so admissible in the court of a State in which the court is sitting.

De Bene Esse.

De bene esse means "provisionally," and when depositions are thus permitted, it is with the intent that they may be used, provided the witness cannot be put upon the stand on the trial of the cause. *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Watson*, 50 C. C. A. 230, 112 Fed. 402; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *Texas & P. R. Co. v.*

Reagan, 55 C. C. A. 427, 118 Fed. 815. See *Frost v. Barber*, 173 Fed. 848; *Zych v. American Car & Foundry Co.* 127 Fed. 723; *Hartman v. Feenaughty*, 139 Fed. 887; U. S. Rev. Stat. sec. 863. The rule applies now to trials in equity suits, which by rule 46 are now tried as actions at law, requiring the witnesses to be examined orally in open court.

The grounds upon which depositions *de bene esse* may be ordered either before or after issue joined, are plain. U. S. Rev. Stat. sec. 863 (Comp. Stat. 1913, sec. 1472). Your application to the court for an order must be supported by affidavit clearly stating one or more of the grounds provided by the statute. Equity rule 47. *Stegner v. Blake*, 36 Fed. 183. See *Richter v. Jerome*, 25 Fed. 679. When this is done, the court may permit the deposition of the named witness to be taken before an examiner or other named officer upon such notice and terms as may be specified in the order. Rule 47. *Iowa Washing Mach. Co. v. Montgomery Ward & Co.* 227 Fed. 1004. Leave to take not necessary in "de bene esse," *id.*

Notice of Taking De Bene Esse.

When the examiner or officer before whom the witness is to be examined, and the time of notice have been stated in the order, the length of the notice depending, of course, on the circumstances, such as the number of witnesses and the distance and facility of communication (*Uhle v. Burnham*, 44 Fed. 729; see also *Kline Bros. & Co. v. Liverpool & L. & G. Ins. Co.* 184 Fed. 969; *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961), then you must give notice to counsel of the name of the witness or witnesses, the time and place of taking their testimony, and the terms of the order required by the court. See new rule No. 53. By sec. 863, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1472), it is provided that whenever by reason of the absence from the district and want of an attorney of record or other reason the giving of the notice in *de bene esse* depositions shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity therefor, upon such notice as any judge authorized to hold courts in such district or circuit shall think reasonable and direct. The application to the court for the order to take depositions is made without notice, but the court

in granting the order to be taken before the examiner or other named officer must certify the notice to be given, etc., in the order.

Form of Notice.

Title as in bill.

To C. D., the defendant, or his solicitor, (naming him) under an order granted by the Hon., Judge, etc., on the day of, A. D., authorizing the plaintiff, (or, defendant) to take the testimony of A. B., a material witness in this cause before Mr., (naming him) as examiner named in said order, you will please take notice that plaintiff will proceed to take the testimony of the said A. B., who resides in the City of,, County of,, State of,, before the examiner named at the office of the said examiner in street, in said city (number of house or office to be given) (or the place stated wherever the deposition is to be taken) on the days of, A. D., at the hour of 10 A. M. and said examination will proceed from day to day until completed. That said depositions when taken will be used by plaintiff at the final bearing of this cause.

R. S.,
Solicitor.

Service of Notice.

This notice may be served on the adverse party, or his attorney of record, and in all cases *in rem* the person having the possession at the time of seizure shall be deemed the adverse party (U. S. Rev. Stat. sec. 863, Comp. Stat. 1913, sec. 1472), and when there is no attorney of record, and the defendant is beyond the reach of the process of the court, or absent from the district, so that giving notice is impracticable, you must then apply to the judge to indicate what character of notice shall be given if the necessity be urgent. *Ibid.* There must be evidence that service was made, or accepted.

Taking the Testimony De Bene Esse.

The testimony may be taken by written interrogatories and cross interrogatories given to the officer before taking, or by oral questions put at the time, as new rules 49 and 52 provide that they may be taken by oral examination, or otherwise. When taken orally, questions and answers must be reduced to writing, whether direct, cross, or on re-examination, or the testimony may be reduced to writing in narrative form. Rule 49.

If taken on written interrogatories and cross interrogatories, the answers must be reduced to writing by the officer or under his direction, in the presence of the witness or by the witness in the magistrate's presence. U. S. Rev. Stat. sec. 864 (Comp. Stat. 1913, sec. 1473); *Re Thomas*, 35 Fed. 823.

By new rule 50 the testimony may be taken by a stenographer who may be appointed by the court or the officer taking the testimony, who is afterwards required to transcribe the same if taken in shorthand. (144 U. S. 689, 36 L. ed. 1143.) Whether the testimony is taken by questions and answers, or is reduced to narrative form, by rule 51 it must be read over to or by him in the presence of the officer, and signed by him in the presence of the officer. *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491. See "How Examination to Be Conducted."

CHAPTER LXXX.

CERTIFICATE OF OFFICER WHEN TAKEN DE BENE ESSE.

Under the old rules it was held that sec. 865 of the United States Revised Statutes (Comp. Stat. 1913, sec. 1474), requiring that the certificate of the officers to the depositions after taking *de bene esse* should give the reasons for taking them, in which it should appear that the witness could not be present to be examined in open court at the trial (Bird v. Halsey, 87 Fed. 677. See Stewart v. Townsend, 41 Fed. 121), did not apply to equity cases (Stegner v. Blake, 36 Fed. 184), but strictly to cases at law, which required that the witness, if within 100 miles of the place of trial, must be brought by subpoena to testify orally at the trial. Sec. 863 (Comp. Stat. 1913, sec. 1472). By new equity rule 47 the testimony of witnesses in equity causes must be taken orally as at trials at law, unless by order of the court, for good and exceptional reasons, the rule should be departed from.

I take it, then, that sec. 865 applies now to equity cases, and on return of the depositions *de bene esse*, to the trial court, the certificate of the officer should show that the depositions were taken because of the existence of one or more of the disabilities existing whereby the witness was unable to appear in open court at the trial as required by sec. 865. However, where depositions are taken *de bene esse* under new rule 47, the party applying to have them taken must by affidavit show the existence of one or more of the causes existing as prescribed by sec. 863 of U. S. Rev. Stat. in order to use them at the trial; and this being the case, it would be sufficient for the officer taking the deposition to certify that it was taken under the order of the court authorizing them.

The following form of certificate is suggested:

Caption—to certificate.

Style of Case—State and County where taken—then proceed.

I.....C. D. (official designation) by virtue of an order of the District Court of the United States for the.....district of....., began the examination of witnesses “de bene esse” on the day of at (stating city street number, if any,) in the above styled suit now pending in the United States District Court for the district of....., sitting at

A. B., a witness on behalf of plaintiff (or defendant) was introduced, and being duly sworn to testify the whole truth, deposes and says:

To question 1. State your name and age.

Answer.

After the depositions have been completed and signed, it should be closed with the following certificate:

STATE OF.....

County of.....

I, C. D. (official designation), do hereby certify that the above witnesses (naming them) were by me first duly sworn to testify the whole truth; that their depositions were reduced to writing by me (or in my presence by....., a stenographer, or on a typewriter by.....) in the presence of said witnesses respectively, and when completed were read over to said witnesses respectively, and subscribed by them in my presence, and such of the parties and counsel as attended.

That said depositions were taken in pursuance of an Order of the United States District Court as set forth in the Caption, and after due notice, as required by the order of said Court at my office at....., beginning on the.....day of.....A. D. 19..., and continued from day to day until the.....day of.....A. D. 19..., when the same were completed.

That the parties were represented by their respective counsel in the examination of said witnesses (if such was the fact; if exhibits were offered during the evidence state) and the several exhibits attached to the depositions were offered in evidence, and marked for identification as appears in the deposition.

I further certify that I am not of counsel nor interested in any manner in the case, and it being impracticable to deliver the depositions in person I have sealed up, directed and transmitted them by due course of mail to the court in which the cause is pending.

In witness whereof I have hereunto set my hand and official seal (if any).

C. D.,
Official Signature.

See Donahue v. Roberts, 19 Fed. 863; Gartside Coal Co. v. Maxwell, 20 Fed. 187; Stegner v. Blake, 36 Fed. 184, 144 U.

S. 690, 36 L. ed. 1143; Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 650; American Exch. Nat. Bank v. First Nat. Bank, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961; Brown v. Ellis, 103 Fed. 837.

While a seal to certification is not necessary, yet the depositions must be sealed up for transmission. U. S. Rev. Stat. sec. 865, Comp. Stat. 1913, sec. 1474; Re Thomas, 35 Fed. 337; Brown v. Ellis, 103 Fed. 836, 837. It is not necessary to certify that the depositions were held until mailed. Stewart v. Townsend, 41 Fed. 121; see Mailing Dep. If the depositions are taken on direct and cross interrogatories handed to the officer before taking, it must be so certified, and the interrogatories returned with the order of the court authorizing them. If the testimony is reduced to writing by a stenographer it must be certified "that said questions and answers were taken down stenographically, and afterwards typewritten, or reduced to writing in my presence by Mr., a skillful stenographer appointed by the court, or approved and agreed to by both parties, and duly sworn by me."

Informality in Certificate.

It has been frequently decided that statutory requirements in taking depositions *de bene esse* must be strictly pursued (Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656. Cook v. Burnley, 11 Wall. 668, 20 L. ed. 30; Bell v. Morrison, 1 Pet. 356, 7 L. ed. 176; Gartside Coal Co. v. Maxwell, 20 Fed. 187; Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495); and there must be evidence of compliance with the rule and statutory requirements. Ibid. While this is true, yet if it appears that the thing to be done has been done, the deposition will be admitted, though the certificate be informal. (Ibid.; United States v. 50 Boxes & Packages of Lace, 92 Fed. 601; Moller v. United State, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495; Stegner v. Blake, 36 Fed. 184; Brown v. Ellis, 103 Fed. 837; Stewart v. Townsend, 41 Fed. 121), because, if informal, it may be amended to meet the facts (Donahue v. Roberts, 19 Fed. 863; Gartside Coal Co. v. Maxwell, 20 Fed. 187; Stegner v. Blake, 36 Fed. 184). If only irregular, it will be waived

if not disposed of before going to trial, as will hereafter be seen. *Re Thomas*, 35 Fed. 823; *Doane v. Glenn*, 21 Wall. 35, 22 L. ed. 476; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 205, 35 L. ed. 149, 11 Sup. Ct. Rep. 500; *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656; *Brown v. Ellis*, 103 Fed. 837; See *McClaskey v. Barr*, 48 Fed. 138. (See "Suppressing Depositions.")

Thus the depositions will not be suppressed when the officer does not certify that he is not an attorney for either party, or omits to insert that he has no interest, when it appears that the depositions were taken in shorthand by a disinterested person. *Stewart v. Townsend*, 41 Fed. 121. Nor when notice is actually given, failure to attach the notice to the return of the deposition is not a ground to suppress. *Stewart v. Townsend*, 41 Fed. 121. Nor need the certificate show that he retained the depositions until mailed. *Ibid.* Nor is a seal required when taken under U. S. Rev. Stat. sec. 863 (Comp. Stat. 1913, sec. 1472); *Brown v. Ellis*, 103 Fed. 836, 837. So a certificate as to the manner of taking down the answers of witnesses, though informal, will not be objectionable on that account. *Ibid.* Nor when taken in a different place from that contained in notice, if counsel for both parties are present. *Gartside Coal Co. v. Maxwell*, 20 Fed. 187.

*Effect of the Act of March 9, 1892, on Taking Depositions in,
Mode Prescribed by State Laws.*

When State Permits Depositions in Advance of the Issues.

By the act of March 9, 1892, it was provided by Congress that the practice in the State courts in issuing depositions may be pursued in the Federal courts. In many of the States depositions may be taken at any stage of the case, but the provisions of these statutes authorizing depositions in advance of the issues do not apply to the Federal courts. The act of 1892 has been frequently construed, and with few exceptions it has been held that State statutes are only to be followed in the manner of taking, and do not apply to the grounds for taking depositions. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601; *Hanks Dental Asso. v. International Tooth Crown*

Co. 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700, reviewing cases; *Zych v. American Car & Foundry Co.* 127 Fed. 728; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953; *National Cash-Register Co. v. Leland*, 37 C. C. A. 372; 94 Fed. 502; *Pullman Co. v. Jordan*, 134 C. C. A. 301, 218 Fed. 574. Congress, it is held, did not enlarge the conditions under which they may be taken for use in the Federal courts. *Ibid.*; *Ex parte Fiske*, 113 U. S. 713-725, 28 L. ed. 1117-1121, 5 Sup. Ct. Rep. 724; *Shellabarger v. Oliver*, 64 Fed. 307, 308; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846. In *Ex parte Fiske*, the Supreme Court held that section 914 of the United States Revised Statutes (Comp. Stat. 1913, sec. 1537), conforming the practice of the Federal courts on the common-law side to the practice of the State courts, did not include an authority to take the depositions of a defendant under oath before trial; that to do so was in conflict with U. S. Rev. Stat. sec. 861 (Comp. Stat. 1913, sec. 1468). *Ibid.*; *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601; *National Cash Register Co. v. Leland*, 94 Fed. 502; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700. This was a construction of a New York law permitting an examination of a party as a witness in advance of the trial. This case was followed in construing the act of 1892, with the result as above stated, and it may be stated that the Texas statute (from 2273 to 2293), in so far as it permits depositions in advance of the issues to be taken does not apply in trials in Federal courts, and this whether the suit be in law or equity. *Shellabarger v. Oliver*, 64 Fed. 307, 308; *National Cash Register Co. v. Leland*, 77 Fed. 242.

In the light of these decisions, then, depositions in advance of the issues joined cannot be taken in the Federal courts unless coming within the provisions of equity rule 47 and the statutes of the United States, sections 863, 866 and 867, as these acts were not in any way added to or modified by the act of 1892. Congress would have so stated in apt words if so intended, is the language of the decisions. *Blood v. Morrin*, 140 Fed. 919.

The Federal courts have never permitted a party to use depositions for the purpose of fishing for information, or to

force a party to disclose his case by pumping him, or his witnesses out of time. *Ibid.* *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 377; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *National Cash-Register Co. v. Leland*, 77 Fed. 242; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700. A contrary view has been strenuously insisted upon by Judge Lacombe of the second circuit in construing the act of 1892 (*International Tooth Crown Co. v. Hanks' Dental Asso.* 101 Fed. 306; *International Tooth Crown Co. v. Carter*, 112 Fed. 396), and by Judge Hanford in *Smith v. Northern P. R. Co.* 110 Fed. 342, but the rule as stated has been decided in the fifth circuit. *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.* 213 Fed. 536. See *Curtis v. Phelps*, 209 Fed. 263. By new rule No. 58, however, parties to suit before or after issue joined may file interrogatories for discovery of material facts and documents in possession of the opposite party material to the support, or the defense of the cause. Said rule provides as follows: The plaintiff, at any time after filing the bill, and not later than twenty-one days after issue joined, and the defendant at any time after filing his answer, and not later than twenty-one days after joining issue, and either party at any time after that by leave of the court, may file interrogatories in writing for discovery by the opposite party or parties of facts and documents material to the support or defense of the cause. By this rule we see that from the time of filing the bill, until twenty-one days after issue joined, the plaintiff may, and after filing the answer and twenty-one days thereafter the defendant may, file interrogatories for discovery to aid them in the prosecution or defense of the cause. After this, either party upon application to the court or judge may file interrogatories for discovery of facts and documents for the purpose as stated above. Only one set of interrogatories of this character can be addressed to the same party without leave of the court or judge. Where the party from whom a discovery is sought is a private or public corporation, application must be made to a court or judge for an order to allow him to file them to be delivered by any officer of the corporation. Upon this application the court will make the order for the examination

of such officer as may appear to be proper, and upon such interrogatories as the court or judge shall think fit.

Procedure in Issuing.

Where the plaintiff or defendant issue interrogatories for discovery within the twenty-one days after issue joined, as provided by the rule, they must be filed in the clerk's office, with copies for the use of the interrogated parties or party, which the clerk of the court must send to the respective solicitors of record, or, if none, to the last known address of the opposite party. The same procedure applies whether the interrogatories are issued after the twenty-one days have elapsed from issue joined, or issued to a corporation, except that an order of court in these cases to file the interrogatories must be obtained and filed with the copies to be served in the clerk's office. See Discovery.

CHAPTER LXXXI.

DEPOSITIONS IN REI PERPETUAM.

We have seen that the U. S. Rev. Stat. sec. 866 (Comp. Stat. 1913, sec. 1477), provides that any of the courts may according to the *usages of chancery* direct depositions to be taken *in perpetuam*, to be used in law or equity, if they relate to matters that may be cognizable in a Federal court (Westinghouse Mach. Co. v. Electric Storage Battery Co. 25 L.R.A. (N.S.) 673, 95 C. C. A. 600, 170 Fed. 431); and by U. S. Rev. Stat. sec. 867, any United States court may in its discretion admit in evidence depositions taken *in perpetuam*, which would be so admissible in a court of the State where such cause is pending, according to the laws thereof. Ohio Copper Min. Co. v. Hutchings, 96 C. C. A. 653, 172 Fed. 202-204. While you cannot use depositions provided for under U. S. Rev. Stat. sec. 866, solely to find out what a defendant or witness will swear to, in advance of the issue (Turner v. Shackman, 27 Fed. 183), yet if your bill is filed and service had (Green v. Compagnia General Italiana Di Navigation, 82 Fed. 495), then the imperative nature of your case may be such that the court will permit testimony to be taken in advance of the issue joined, and even *ex parte* (New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co. 20 Blatchf. 174, 9 Fed. 578); as when, after defendant is served with process, he absconds before answering. Westinghouse Mach. Co. v. Electric Storage Battery Co. 25 L.R.A. (N.S.) 673, 95 C. C. A. 600, 170 Fed. 430. In this last case it is said that an original bill *in perpetuam rei memoriam* according to usages of chancery and a *dedimus* to take depositions according to "common usage," are distinct methods contemplating different procedure. Richter v. Jerome, 25 Fed. 682.

As to when an order will issue to take evidence *in perpetuam* in a Federal court depends on a proper construction of the words "according to usages in chancery." The provision is

substantially the same as was enacted in clause 30 of the judiciary act of 1789, and it has been held that the usages referred to were such as were known to the English chancery practice in 1789. *Greene v. Compagnia Generale Italiana Di Navigazione*, 82 Fed. 494; 2 Dan. Ch. Pr. 1572-1574; *Richter v. Jerome*, 25 Fed. 682; see old equity rule 90, not in new rules.

Under the usages of chancery the original bill must be filed and service had on the defendant before an order will issue, and ordinarily, it is said, the defendant must answer before the testimony is taken, but if he has been served and refuses to answer or absconds, or conceals himself, then you may proceed *ex parte* to perpetuate the testimony. In the English cases, this is said to be the utmost extent to which courts will go in allowing the depositions of this character taken before issue joined.

In *Richter v. Union Trust Co.* (*Richter v. Jerome*) 115 U. S. 55, 29 L. ed. 345, 5 Sup. Ct. Rep. 1162, it was held that depositions *in rei perpetuam* could be taken in a case appealed to the Supreme Court from sustaining a demurrer to the bill, and pending which it became necessary to take the depositions of aged witnesses which were material and necessary, in the event the trial on its merits was permitted.

It will be noticed that the language of the statute contemplates taking this character of deposition, if it relates to matters *that may be cognizable* in courts of the United States, but it is further seen that it must be according to "the usages of chancery," so it is held under the United States laws the deposition cannot be taken in contemplation of a suit that may be brought, and in anticipation of such suit, to perpetuate the testimony. *Green v. Compagnia Generale Italiana Di Navigazione*, 82 Fed. 494. A contrary view is taken in *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A. (N.S.) 673, 95 C. C. A. 600, 170 Fed. 432, wherein it is held the right exists when the complainant has an interest which cannot be made the subject of judicial inquiry at the time, and where the interest may be lost by the death of a witness. This view is supported by abundance of authority. S. C. 165 Fed. 994. See *New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 11 Fed. 813, S. C. 9 Fed. 578. We may next inquire how far it can be done for use in a Federal court,

when taken under a State law, if such provision is made. We have seen that by U. S. Rev. Stat. sec. 867 (Comp. Stat. 1913, sec. 1478), that a court of the United States may in *its discretion* admit in evidence in any cause before it, any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. *Richter v. Jerome*, 25 Fed. 682; *See Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700.

In Texas by article 2277 of Batts's Rev. Stat., depositions may be taken by one anticipating a suit who may desire to perpetuate the testimony, and such testimony may be used in any suit by and between any parties to the statement, etc. The question arises then, Can a person who expects to be a party to a suit in a Federal court take the depositions under this statute? In *New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 20 Blatchf. 174, 9 Fed. 578, it is said the provision is intended to admit in evidence testimony of this character taken and perpetuated according to the laws of the State in which the Federal court is sitting, and does not refer to testimony perpetuated by direction of a circuit court of the United States in pursuance of the statute of the United States. See also act March 9, 1892, 27 Stat. at L. 7, chap. 14 (Comp. Stat. 1913, sec. 1476); *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 602, 603. See *Warren v. Younger*, 18 Fed. 859; *National Cash Register Co. v. Leland*, 77 Fed. 242. See *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A.(N.S.) 673, 95 C. C. A. 600, 170 Fed. 432.

So it may be said that it rests in the discretion of the Federal judge to permit depositions taken *in perpetuam rei memoriam* to be used in evidence when taken under the laws of the State in which the court is sitting, and this power rests upon section 867 of the United States Revised Statutes, and is not affected by the act of 1892 authorizing depositions to be taken in the Federal courts in the modes prescribed by the laws of the State in which the court is sitting.

Dedimus Potestatem.

By U. S. Rev. Stat. sec. 866 (Comp. Stat. 1913, sec. 1477), it is provided that in any case where *it is necessary* to prevent

a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to "common usage." It has been held "that in any case where it is necessary," etc., means civil or criminal cases, and civil case means any case at law, or in equity. *United States v. Cameron*, 15 Fed. 794. The words "common usage" have been variously construed, but mean, so far as it may be applied to equity causes, the practice in courts of equity. *Budicum v. Kirk*, 3 Cranch, 295, 2 L. ed. 444; *Turner v. Shackman*, 27 Fed. 183; *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 992; *Bischoffsheim v. Baltzer*, 20 Blatchf. 229, 10 Fed. 1; *Encyclopædia Britannica Co. v. Werner Co.* 138 Fed. 462; *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 602, 603; *Warren v. Younger*, 18 Fed. 862; *Green v. Compagnia Generale Italiana Di Navigation*, 82 Fed. 494; *United States v. Pings*, 4 Fed. 716; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 696. "Common usage" must be construed to mean the common usage in 1874 when the act was passed. Rev. Stat. sec. 866. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 602, 603.

The purpose of the act is evidently to provide a method for taking depositions of a witness, to prevent a failure or delay of justice where the particular conditions existing do not come within the provisions of section 863.

It is a supplementary proceeding in a case already brought, and not a method to procure testimony in anticipation of a suit. *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A.(N.S.) 673, 95 C. C. A. 600, 170 Fed. 432; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 694; *Zych v. American Car & Foundry Co.* 127 Fed. 724; *Turner v. Shackman*, 27 Fed. 183.

What the threatened delay of failure of justice may be which is not provided for by other acts of Congress must be left to the discretion of the court upon the facts of each particular case, when the application is made and the reasons stated. *United States v. Cameron*, 15 Fed. 794; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846; *Randall v. Venable*, 17 Fed. 163; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 517. A showing of necessity must be made. *Magone v. Col.*
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orado Smelting & Min. Co. 135 Fed. 847, 848. Conditions have been held imperative, and a *dedimus* issued in case of sailors in transit, and the courts have permitted the depositions to be taken without notice, or on such terms as to notice as seemed proper in the particular case.

New rule 54, providing for taking depositions according to the acts of Congress, embraces secs. 866 and 867 of the Revised Statutes of the United States (Comp. Stat. 1913, secs. 1477, 1478), but makes a further provision for cases in which the deposition has to be taken without notice to the adverse party of the time and place of taking, by permitting the adverse party afterwards to cross-examine the witness, or issue new depositions with the permission of the judge.

Certificate to a Dedimus.

The certificate need not show the many details required under secs. 863, 864, and 865, U. S. Rev. Stat. *Jones v. Oregon C. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486; *Rhoades v. Selin*, 4 Wash. C. C. 715, Fed. Cas. No. 11,740; *Giles v. Paxson*, 36 Fed. 882; *Keene v. Meade*, 3 Pet. 9, 7 L. ed. 584. The person appointed to execute the *dedimus* represents the court, and not the parties, and the return is sufficient, showing that the witness was examined in pursuance of the commission and was duly sworn or affirmed. *Ibid.* As to form, see *Jones v. Oregon C. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486.

Procedure.

To take testimony under section 866 you must file a petition or motion to be served on the adverse party or his counsel, and it must be averred that there is a suit pending in which the testimony of the witness named will be material; that the depositions cannot be taken by the ordinary methods prescribed by the statutes or rules of court, and the aid of the court is necessary to prevent a failure or delay of justice if the evidence is not taken. The facts expected to be proven must be shown and the danger that the testimony may be lost by delay (*Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 992-994; *Flower v. MacGinnis*, 50 C. C. A. 291, 112

Fed. 378; Zych v. American Car & Foundry Co. 127 Fed. 723; Magone v. Colorado Smelting & Min. Co. 135 Fed. 846; Richter v. Jerome, 25 Fed. 680, 681); and the application must be made to the court. New rules 47 and 54.

The defendant may appear and answer, showing cause why the application should not be granted, and fourteen days is allowed to do this. Greene v. Compagnia Generale Italiana Di Navigation, 82 Fed. 495. If, however, the application is made for an *ex parte* examination, the necessity must be clearly stated, as where the defendant has absconded, or is beyond the reach of service, and has no counsel of record, and the situation of the witness renders his examination without delay imperative.

Form of Order.

Style of Case.	In Equity.	In District Court of the United States for the.....district of.....
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This cause coming on to be heard on the motion of plaintiff for a *dedimus potestatem* to issue, to take the testimony of....., a material witness for plaintiff, who is now at....., and both parties being represented by counsel, and the court having considered the motion and answer thereto and the affidavits filed therewith, it is the opinion of the court that the motion should be granted. It is therefore ordered that a *dedimus potestatem* be issued in this cause, directed to A. B., Esq., at....., empowering him to examine the said.....witness, due notice of the time and place of said examination to be given to counsel of both parties (or if on interrogatories and cross interrogatories, then state).

It is ordered that a *dedimus potestatem* be issued in this cause, directed to A. B., Esq., at....., empowering him to examine....., the witness named in this cause, upon the interrogatories and cross interrogatories to be attached to the order issued herein. It is further ordered that the testimony given under such examination shall be reduced to writing, signed by the witness, certified by the said A. B., Esq., and returned by him by mail to the clerk of this court at the city of.....

The testimony thus taken shall be subject to such legal objections as may be properly made to the same on the trial of the cause.

C. B., Judge of the District Court, etc.

The duties of the examiner or commissioner appointed to take depositions may be regulated by the court, either by general rules or special instructions accompanying the order. United States v. 50 Boxes & Packages of Lace, 92 Fed. 601. See

Hollander v. Baiz, 40 Fed. 659. The order may not state the place or time when the examination is to be held, but in this event reasonable notice must be given by the examiner or commissioner to counsel of the time and place the examination is to be held. However, when directed to a foreign country the time within which the examination is to be held, and the city or cities where it is to be held, are usually stated, requiring the examiner or commissioner to give a more specific notice of the day and place, within the period of time allotted by the order.

While it has been held that common usage limited the taking of depositions under a *dedimus* to interrogatories and cross interrogatories, yet it is the better opinion that "common usage" embraces any method of taking the examination authorized by Congress in the past or present, or according to the existing practice in equity (Bischoffsheim v. Baltzer, 20 Blatchf. 229, 10 Fed. 1; United States v. 50 Boxes & Packages of Lace, 92 Fed. 603; Giles v. Paxson, 36 Fed. 882; United States v. Cameron, 15 Fed. 794); or by any of the methods provided by equity rule, or the statutory provisions of the State (Giles v. Paxson, 36 Fed. 882; Compania Azucarera Cubana v. Ingraham, 180 Fed. 517; McLennan v. Kansas City, St. J. & C. B. R. Co. 22 Fed. 198).

CHAPTER LXXXII.

DEPOSITIONS AFTER ISSUE JOINED.

Time in Which Evidence Must Be Taken.

Having discussed the taking of depositions before issue joined, under the equity rules and statutes permitting it, I will now discuss the taking of depositions after issue joined, and, first, I will speak of the time within which you must complete your evidence in an equity cause.

New rule 47 provides that all depositions allowed to be taken under these rules or the Federal statutes shall be taken and filed as follows, unless for good cause the court or judge has extended the time: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for filing plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original deposition expires. Under old rule 69, now substituted by new rule 47, three months was allowed for all parties within which depositions were to be taken, unless the court enlarged the time, and no testimony taken after that period was permitted to be read on the hearing. *Victor Talking Mach. Co. v. Sonora Phonograph Corp.* 221 Fed. 676. Rule 47 controls all depositions, whether taken under a statute or the rule (*Ibid.* 678; *Ingle v. Jones*, 9 Wall. 486, 19 L. ed. 621. The rule has been frequently declared imperative. *Ibid.*; *Wooster v. Clark*, 9 Fed. 854; *Re Thomas*, 35 Fed. 337; *McGorray v. O'Connor*, 31 C. C. A. 114, 59 U. S. App. 452, 87 Fed. 588; *Jewell v. State Life Ins. Co.* 99 C. C. A. 372, 176 Fed. 64; *Wenham v. Switzer*, 48 Fed. 612; *Munroe v. Atlanta Mach. Works*, 170 Fed. 863; *Wooster v. Clark*, 9 Fed. 854; *Brown v. Worster*, 113 Fed. 20; *Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 29; *Western Electric Co. v. Capital Teleph. & Teleg. Co.* 86 Fed. 770; *Fischer v. Hayes*, 19

Blatchf. 13, 6 Fed. 76), unless the court had extended the time (Schmeiser Mfg. Co. v. Blanchard, 192 Fed. 363; Fischer v. Hayes, 19 Blatchf. 13, 6 Fed. 76; Coon v. Abbott, 37 Fed. 98; Grant v. Phoenix Mut. L. Ins. Co. 121 U. S. 115, 116, 30 L. ed. 908, 909, 7 Sup. Ct. Rep. 841; Coosan Min. Co. v. Farmers' Min. Co. 67 Fed. 32), upon motion, seasonable cause being shown. Emerson Co. v. Nimocks, 88 Fed. 280.

We thus see that the decisions under the old rule held that the time within which depositions were to be taken was imperative. Yet great latitude to the discretion of the court or judge was allowed even to permitting the filing *nunc pro tunc* (Wenham v. Switzer, 48 Fed. 612), and taking and filing after trial, as in the case of Rankin v. Miller, 199 Fed. 342, where the court considers the proof of the fact essential to the doing of justice in the case. The discretion of the court permitting depositions to be taken after the time provided by the rules has elapsed has not been impaired or limited by the new rules when the testimony sought is essential to doing complete justice in the case, and where it may be shown that the witness cannot be put on the stand to testify on the trial.

New rule 56 clearly indicates that after the case has been put on the trial calendar the court may, for strong reasons set forth by affidavit, permit depositions to be taken at any time before trial. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. 217 Fed. 175, 176.

Rule 56 is as follows: After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony *by deposition* shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness shall give. Victor Talking Mach. Co. v. Sonora Phonograph Corp. 221 Fed. 677. It must be kept in mind that under the new rules the witness must appear in open court unless the conditions exist permitting his deposition to be taken (see *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 517); and when they have not been taken within the time required by the rules, the question whether the witness can be produced to testify in open

court becomes an important consideration in applying for permission to take his deposition.

By equity rule 48, in patent and trademark cases the court may on petition order the testimony in chief of expert witnesses in matters of opinion to be set forth by affidavits to be filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the time for original affidavits has expired. Should the opposite party desire the production of an affiant for cross-examination, the court or judge upon motion shall direct that said cross-examination and any re-examination take place before the court on trial of the cause; and unless such affiant is produced and submits to cross-examination, his affidavit shall not be used as evidence in the cause. This rule applies simply to opinions of expert witnesses, even though they may not come within sec. 863, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1472). It is intended to promote the convenience of professional witnesses who know nothing of the facts of the case, as well as to expedite the taking of evidence. So where it is shown to the court that the evidence sought is purely expert opinion, he may order that the opinions be taken by affidavits, instead of requiring the witness to appear at the trial, unless the opposite party demand his presence for cross-examination. The rule is cumulative, and does not exclude the ordinary methods of taking depositions if allowed under the rules or statutes.

Counsel may Agree upon the Time within Which Depositions may be Taken.

We have seen by rule 56, that after the time for taking depositions under the rules as above stated has expired, the case must be placed upon the trial calendar, which concludes the taking of further testimony except upon application supported by strong reasons therefor. In the fourth circuit it has been decided that counsel may consent to take testimony regardless of the time required by the rules. *Fortney v. Carter*, 121 C. C. A. 514, 203 Fed. 454; *United Lace & Braid Mfg. Co. v. Barthsly Mfg. Co.* 217 Fed. 175.

How Witnesses Examined After Issue Joined.

There are five ways of examining witnesses under the rules:

1st. By examination in open court. Equity rule 46.

2d. By oral examination before an examiner or commissioner or officer appointed for that purpose. Equity rule 47.

3d. By taking them under the laws of the State in which the trial is had. Act of Congress March 9th, 1892 (Comp. Stat. 1913, sec. 1476.)

4th. Upon written interrogatories by order of the court. Equity rules 58-63, 65.

5th. By affidavits as provided by rule 48.

1st. By Examination in Open Court.

Rule 46 provides that all trials in equity shall be taken orally in open court, except as otherwise provided by statute and these rules. The court is required to pass upon the admissibility of evidence offered, as in actions at law. The court shall report all exceptions to the evidence when offered and *excluded* taken by the party offering it, or so much thereof as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception.

Under the old rules a case in equity was tried upon the record, which was required to contain all the evidence taken, and consequently on an oral examination in court the testimony was required to be taken down in writing and signed by the witness and filed as a part of the record. *Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 523; *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 274. But by rule 46, requiring the trial to be as an action at law, and new rule 75, requiring that the record shall not contain the evidence in full, but that the evidence shall be stated in simple and condensed form, omitting all parts not essential to the decision of questions presented by an appeal, and forbidding the reproduction of any part of the testimony in the language of the witness, unless either party desires it and the court allows it, it becomes apparent that the old rule as stated above no longer applies, and the evidence is taken as in trials at law. *United States v. Motion Picture Patents Co.* 230 Fed. 541; *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. ed. 1177, 35 Sup. Ct. Rep. 696.

2d. *By Oral Examination before an Examiner or Commissioner—Appointment of an Examiner, etc.*

New rule 47, which recognizes that the testimony of witnesses in equity trials must be taken in open court orally, as the general rule, provides that for good and exceptional cause for departing from said rule, either party may, when allowed by statute or the rules, to be shown by affidavit, may apply to take the depositions of witnesses named out of court, before an examiner or other named officer upon notice and terms specified in the order of the court or judge granting the application.

The application may be as follows:

Title as in bill.

And now comes A. B., plaintiff, (or defendant) and says that the above cause is now at issue and that he desires to take the testimony of C. D. E. & F., who are material witnesses in this cause, before Jno. D. Smith, Esq., who is a citizen of....., in the County of....., in the State of....., which testimony is to be used in the trial of this Cause before the Court.

That this application is made under rule 47, and for the following reasons—

(Here state your reasons whether the application is made under a Statute permitting the depositions to be taken, or under rule 47 permitting for some good and sufficient reasons, independent of the statutes, depositions to be taken.)

Wherefore plaintiff prays the Court to grant the application and to appoint the aforesaid Jno. Smith, an Examiner (or Commissioner), to take the testimony of said witnesses (named) upon such notice and terms as the Court may deem proper to make.

R. F.,
Solicitor.

The application must be verified by oath, by the oath of the party making it, or the application may be made, supported by affidavit of the causes upon which the application is made.

Order Appointing the Examiner.

The court granting the application, counsel should draw up the order for his signature, as follows:

Title as in bill.

This cause coming on to be heard on this the.....day of....., A. D....., upon the motion of plaintiff (or defendant) to take the

testimony of A. B. C. D. etc., alleged to be material witnesses in this cause, before Jno. Smith, Esq., of, in the County of, in the State of, as Examiner, it is hereby ordered that the said Jno. Smith, Esq., be appointed Examiner to take the depositions of the said witnesses above named to be used in court on the trial of said cause. It is ordered that notice of the time and place of taking said testimony shall be served upon the opposite party or his Solicitor of record at least days before said examination begins.

Equity rule 53.

(Here insert any further terms the Court may order.)

That said evidence shall be taken in accordance with rules 49-50 and 51, and the same returned into Court within the time provided by rule 47.

(If further time be given so state in the order.)

Judge, ———.

The old rule permitting the appointment of an examiner to take the testimony of any witnesses that may be brought before him has been abrogated, and the application and order must state specifically the names of the witnesses to be examined.

If the application is filed pending a cause or after it has been placed on the calendar for trial, where the depositions cannot be taken and returned within the time required by rule 47, then the time of taking and return must be specifically stated in the order of the court. The time stated in the order must be reasonably sufficient. *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961.

Examiners Beyond the Limits of the Court's Jurisdiction.

The practice of appointing examiners beyond the jurisdiction of the court was, under the old rules, doubted by some of the judges, but the reasons given are no longer tenable under the new rules. There is no question as to exercise of this power under rule 47. *Schutte v. Florida C. R. Co.* 3 Woods, 692-697, Fed. Cas. No. 17,434, decided on circuit, *White v. Toledo, St. L. & K. C. R. Co.* 24 C. C. A. 467, 51 U. S. App. 54, 79 Fed. 133; *Davis v. Davis*, 90 Fed. 791.

Notice of Examination.

As soon as possible after the appointment of an examiner, the taking of testimony should begin. By rule 53 it is provided

that notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or officer, for such reasonable time as the court or officer may fix by order in each case. By rule 47 the court may fix the notice and terms to be followed by the examiner and counsel, but if circumstances should make the time so fixed inconvenient and unreasonable to any of the parties, or should the court not direct the notice to be given, the officer taking the deposition may give notice of the time and place of the examination to counsel or parties interested, as was the practice under the old rules. *Wenham v. Switzer*, 48 Fed. 612. See *Uhle v. Burnham*, 44 Fed. 729. The form of notice:

Title as in Bill.

To A. B., Solicitor, etc.

You will please take notice, that having been appointed by the Hon., judge of the District Court for the district of, an examiner to take the testimony of, witnesses named in the order of the Court for and in behalf of plaintiff, (or defendant). I will begin said examination on the day of, A. D. 19, at 10 A. M. (here designate place, stating street, house, number, City, County and State,) and that I will proceed with said examination from day to day until completed.

Jno. Smith,

Examiner.

Notice accepted on this the day of, A. D. 19

If the notice of the time and place of taking is fixed in the order of the court, and the notice is given by the solicitor of the party applying to take the depositions, the form may be changed accordingly, and signed by the solicitor. It may be served by an officer, or service accepted by the opposite party or his counsel.

Examination of Witnesses.

First, process for. The examiner being furnished with the order of the court naming the witnesses to be examined. By rule 52, witnesses living within the district of trial, and whose testimony may be taken out of court, may be summoned to appear before an examiner appointed to take testimony, by

subpœna in the usual form, which may be issued by the clerk in blank, and filled in by the party praying the same, or by the commissioner, master, or examiner requiring the attendance of the witnesses at the time and place specified.

By sec. 876, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1487), subpœnas for witnesses who are required to attend court in any district may run into any other district, provided that in civil causes the witnesses living out of the district in which the court is held.

By U. S. Rev. Stat. sec. 868 (Comp. Stat. 1913, sec. 1479), the clerk of any district court of the United States or territory on application of either party to the suit or his agent shall issue a subpœna for any witness named to appear, etc., before any examiner or commissioner authorized to examine witnesses in the pending suit, in any district or territory where such examination is being held. The examiner will use the blank subpœnas furnished by the clerk of the court in which the suit is pending, and when prepared, the examiner will deliver them to the United States marshal to be served, or to a deputy usually provided to attend the examiner, for service on the witnesses.

If the examination is being held in another Federal district, and over one hundred miles from the place where the suit is pending, then the clerk of the United States circuit court of the district in which the examination is being held should issue the subpœnas upon application of the examiner (U. S. Rev. Stat. sec. 876 (Comp. Stat. 1913, sec. 1487); *Meyer v. Consolidated Ice Co.* 163 Fed. 400), and this subpœna must be served by the officers of the Federal district in which the examination is being held. *Re Allis*, 44 Fed. 217; *United States v. Standard Sanitary Mfg. Co.* 187 Fed. 234, and cases cited.

Note that the subpœna must be issued by the clerk of the court in which the suit is pending, if the witness resides, or is within a hundred miles of the place of suit, though in another district. U. S. Rev. Stat. sec. 876, provides that a subpœna may run into any other district, if the witness lives within a hundred miles of the courthouse where the court is held and from which the subpœna is issued. See sec. 868. *Meyer v. Consolidated Ice Co.* 163 Fed. 404. And a witness under sec. 863, U. S. Rev. Stat. may be required to appear and submit to an examination outside the district in which the suit is pend-

ing. *Davis v. Davis*, 90 Fed. 791; *Tomlinson v. Moore*, 189 Fed. 845.

By sec. 870, U. S. Rev. Stat., no witness under a *dedimus potestatem* shall be required to attend out of the county of his residence, nor more than forty miles from his residence, and no witness is guilty of contempt for nonattendance unless his fees are paid or tendered when service is made. The fees to be tendered or paid must be the expense of going to and returning from the place of examination, and one day's attendance. This being done, the witness must obey. U. S. Rev. Stat. sec. 868; *Norris v. Hassler*, 23 Fed. 581; *Re Boeshore*, 125 Fed. 652; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 843. If the witness refuses to appear, or, appearing, refuses to answer, it is deemed a contempt of court, if he is not otherwise privileged from giving testimony. The refusal to appear, or appearing, to answer, must be certified to the clerk's office from which the subpoena issued, by the examiner, and the Judge of the court may proceed to enforce obedience to the process, as in like cases in any court. U. S. Rev. Stat. sec. 868; *Re Spofford*, 62 Fed. 443; *Re Allis*, 44 Fed. 217; *Bird v. Halsy*, 87 Fed. 675; *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324; *United States v. Standard Sanitary Mfg. Co.* 187 Fed. 234; *Johnson Steel Street-Rail. Co. v. North Branch Steel Co.* 48 Fed. 192.

By rule 52, if a witness shall refuse to appear or give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the examiner, an attachment may issue thereon by order of the court or any judge thereof, in the same manner as if the contempt was for refusal to appear or refusing to give testimony in court. In cases of refusal of witnesses to attend or be sworn, or to answer any question put by the examiner or counsel, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner on written interrogatories.

By rule 58, cl. 5, the court or judge upon motion and reasonable notice may enforce answers by parties to the suit to interrogatories material to the cause of action or defense. A party failing to comply with an order to answer is liable to attachment, and, further, if plaintiff, the cause may be dismissed; if defendant, he is liable to have his answer stricken out and default taken.

Who is to Pass upon Materiality or Relevancy of Evidence Taken by Examiners, etc., out of the District of Trial.

The question has arisen as to whose duty it is to pass upon the relevancy or materiality of the evidence when taken in a district other than that of the trial.

In *Dowagiac Mfg. Co. v. Lochren*, 74 C. C. A. 341, 143 Fed. 211-215, 6 A. & E. Ann. Cas. 573, and cases cited, it is said that it is not the duty of the auxiliary judge to consider or determine these questions, but only to compel the production of the evidence though deemed incompetent or irrelevant by him, but with the proviso that he will not compel privileged evidence, or a privileged witness to testify, nor when there is no doubt that the evidence sought is incompetent, immaterial, or irrelevant. The rule thus laid down applies to equity rules 52, 53, 59, 60, 63, 65, as well as to evidence under sections 863, 868, and 869 (Comp. Stat. 1913, secs. 1472, 1479, 1480), at law. *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521; See *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241. In *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 844, Judge Lacombe thought it best to send back the question of materiality and relevancy to the trial judge, and upon his determination of the matter to compel or not the witness to answer; but in this his associates differed with him, and the rule as above stated was enforced. See *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324 and cases cited; *Fayerweather v. Ritch*, 89 Fed. 529; *Maxim Nordenfelt Guns & Ammunition Co. v. Colts Patent Firearms Mfg. Co.* 103 Fed. 39; *Lloyd v. Pennie*, 50 Fed. 4-12; *Parisian Comb Co. v. Eschwege*, 92 Fed. 721. These cases overrule the conclusion reached in *Re Allis*, 44 Fed. 216. Except under the conditions above stated, the witness will be compelled to answer. *Perry v. Rubber Tire Wheel Co.* 138 Fed. 836; *Robinson v. Philadelphia R. Co.* 28 Fed. 341.

By equity rule 51 the officer has no power to pass upon or decide on the competency, materiality, or relevancy of any question under whatever rule the depositions are taken, see chap. 87.

Subpœna duces tecum.

By equity rule 58, cl. 5, the court or judge may make upon

reasonable notice an order to effect the inspection or production of documents in the possession of either party, containing material evidence for the cause of action or defense.

By sec. 869, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1480), a *subpœna duces tecum* under a *dedimus potestatem* requires a witness to appear and testify, and to bring with him to be produced before the court, commissioner, or examiner, any paper, writing, book, or document in his possession or power, material to the investigation. *Re Shepard*, 3 Fed. 12. The book, paper, document, etc., sought must be described in the application, supported by affidavit; and in the subpœna, if the court is satisfied it should be issued; and the order made to the clerk to issue it completes the process. This section regulates the issuing of these subpœnas in the United States courts and also applies to cases where depositions are taken *de bene esse* under sec. 863 or *in perpetuam* under sec. 866 (*Davis v. Davis*, 90 Fed. 791; *Kirkpatrick v. Pope Mfg. Co.* 61 Fed. 48), or when a *dedimus* is issued. Under sec. 869, U. S. Rev. Stat., the subpœna should only be issued under the order of a court, for reasons lucidly set forth in *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 760, 762; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

Application for and description of instrument.

Sec. 869, which, as said, regulates the issuing of *subpœnas duces tecum* in the courts of the United States, requires an application to the judge of the district, to be supported by the affidavit of the party applying, and the court, being satisfied, by the affidavit or otherwise, that there is reason to believe that the paper, document, etc., is in the possession or power of the witness, and that the same if produced would be competent and material evidence for the party applying, may order the clerk to issue the subpœna. See *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 162; also *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 142. Of course, the instrument, etc., should be described in the application as a basis for issuing the subpœna, which must contain the description. If the instrument is not properly described, the production will be refused. *Murray v. Louisiana*, 163 U. S. 107, 41 L. ed. 89, 16

Sup. Ct. Rep. 990, 10 Am. Crim. Rep. 242. But if properly described, the witness must produce what is called for. Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 297, s. c. 45 Fed. 55; Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 195. In Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 176, it is said generally in the designation of books or writings is not objectionable if the subject-matter to which they relate is specifically mentioned in the motion and subpœna. When properly described, the witness cannot say he delivered them to his counsel, but must produce them, as they are still in his power. Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 297, see s. c. 45 Fed. 55; see Davis v. Davis, 90 Fed. 792.

Exceptions to Rule.

A call for private papers not in issue will not be enforced (Dancel v. Goodyear Shoe Machinery Co. 128 Fed. 754-762); nor when the call is for a cart load of books (Ibid.); nor to reveal trade secrets (Crocker-Wheeler Co. v. Bullock, 134 Fed. 241; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 176; but see Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 191).

When Issued in Equity Causes.

By sec. 724 (Comp. Stat. 1913, sec. 1469), in causes at law the court may on motion grant to either party, after due notice thereof, an order requiring the parties to produce books or other writings in their possession or power, which contain evidence pertinent to *the issue*, under circumstances in which they may be compelled to produce the same by the ordinary rules of proceeding in Chancery. The whole purpose of this section was to eliminate the formality of going into a court of equity for a bill of discovery. Owyhee Land & Irrig. Co. v. Tautphaus, 48 C. C. A. 535, 109 Fed. 547; Ryder v. Bate-man, 93 Fed. 31; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 48. This section applies only to causes at law, but before granting the order, the party applying must make reasonable proof of

the existence of the documents, etc., and their pertinency to the issues, and the possession or control of the opposite party. *Ibid.*; *Owyhee Land & Irrig. Co. v. Tautphaus*, 48 C. C. A. 535, 109 Fed. 547; *Paine v. Warren*, 33 Fed. 357. It is not a matter of right, as the issuing of a *subpœna ad testificandum*, but the court exercises a discretion, following the practice in such cases in chancery. *Gregory v. Chicago, M. & St. P. R. Co.* 3 McCrary, 374, 10 Fed. 529; *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 761, 762. However, in *American Lithographic Co. v. Werckmeister*, 91 C. C. A. 376, 165 Fed. 426, the court held that the power to require the production of documentary evidence was not limited to an order made on motion, as provided by sec. 724, but that under Rev. Stat. sec. 716, that it had express power, as well as its inherent power to issue any writ necessary for the proper exercise of its jurisdiction.

So far, then, we see that this chancery power was given to courts of law to avoid an appeal to equity for discovery, but in equity the chancery rules and procedure in issuing the *subpœna duces tecum* have not been changed. *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 140. Equity rule 58.

A *subpœna duces tecum* may issue when the depositions in chancery are taken under equity rule 47, and whether taken under a commission on direct or cross interrogatories, or orally before an examiner. As said in *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 762, the settled practice of the courts is not to issue *subpœnas duces tecum* under sec. 863 (Comp. Stat. 1913, sec. 1472), or rule 47, except by order of the court and upon preliminary proofs of necessity. There is no question, that whether depositions are being taken under a commission *de bene esse* (U. S. Rev. Stat. sec. 863) or a *dedimus* under U. S. Rev. Stat. sec. 869, or equity rule 58, there must an application and an order, as heretofore stated, as a basis for contempt proceedings in case of refusal to obey the *subpœna*. *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 761, 762; see *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 141; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 242, 243; *Gregory v. Chicago, M. & St. P. R. Co.* 3 McCrary, 374, 10 Fed. 529. In *Dancel v. Goodyear Shoe Machinery Co.* supra, it is said a notary public taking depositions has no power to issue a *subpœna duces tecum*. In *Pepper v. Rogers*, 137 Fed. 173, it is said that when
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papers are produced before an examiner by witnesses under a *subpœna duces tecum*, the court cannot order the examiner to remove them to another district, to be used in the examination of other witnesses.

Penalty for Refusal.

Sec. 724 provides a penalty if the plaintiff or defendant fails to comply with the order, to wit, nonsuit in case of the plaintiff, and judgment by default in case the defendant fails to comply (Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 175, s. c. 110 Fed. 76), but not when the action is penal, or for the recovery of penalties, as, for instance, under sec. 4901 of U. S. Rev. Stat (Comp. Stat. 1913, sec. 9447); Newgold v. American Electrical Novelty & Mfg. Co. 108 Fed. 341, 342. Equity rule 58, cl. 5.

CHAPTER LXXXIII.

HOW EXAMINATION TO BE CONDUCTED.

The examination of the witness takes place in the presence of the commissioner, examiner, and the parties, or their agents, and by the commissioner or examiner or counsel, if present, and the witnesses are subject to cross-examination or re-examination if taken orally, as if upon the stand in court. New rule 49. By this rule all evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into court. Depositions, whether upon oral examination before an examiner, or otherwise, shall be taken on questions and answers reduced to writing, or the evidence may be taken in narrative form, whether direct, cross, or re-examination.

By rule 50 a stenographer may be appointed by the court or officer, who may be required to transcribe the evidence.

By rule 51 objections to the evidence shall be in short form, stating grounds. The testimony, after being reduced to writing, must be read to witness giving the evidence, and should be signed by him in the presence of the officer, provided that if the witness refuses to sign, the officer shall sign the same, giving reasons, if any, assigned by the witness, for the refusal. Objections made to questions shall be noted by the officer on the deposition, but the officer cannot decide on the competency or materiality of the questions. *Rollman Mfg. Co. v. Universal Hardware Works*, 229 Fed. 581.

We see, then, any question objected to must be noted, with objections made, but the examiner has no power to decide on the competency, materiality, or relevancy of the question asked. The court alone can deal with the competency and relevancy; nor will the court pass upon it during the examination of the witness. *Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co.* 103 Fed. 39; *Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 702; *Brown v. Worster*, 113 Fed. 20; *Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 523;

Whitehead & H. Co. v. O'Callahan, 130 Fed. 243; Re Romine, 138 Fed. 839; Diamond Drill & Mach. Co. v. Kelly Bros. 120 Fed. 282. The court can control irrelevant questions by charging up the costs, where there is a reckless disregard of the rules of evidence. Ibid. This may be met by motion to strike out the irrelevant evidence and charge up the costs. Griffith v. Shaw, 89 Fed. 313. Equity rule 51.

Counsel cannot instruct a witness not to answer a question, unless it is criminating (Thompson-Houston Electric Co. v. Jeffrey Mfg. Co. 83 Fed. 614), nor can the examination be stopped to refer the relevancy of the question to the court (De Roux v. Girard, 90 Fed. 537; Parisian Comb Co. v. Eschwege, 92 Fed. 721). Again, an examiner is not under the instruction of counsel, and they cannot stop the examination (Re Rindskopf, 24 Fed. 542), nor control it in any way. First Nat. Bank v. Forest, 44 Fed. 246; J. L. Mott Iron-Works v. Standard Mfg. Co. 48 Fed. 345.

The Examination is to Be Reduced to Writing.

The examiner is to reduce to writing the questions and answers as put and given, or by consent of parties it may be written in narrative form. By equity rule 50, the questions and answers may be taken by a stenographer, or typewriter, as the examiner may elect. Brown v. Ellis, 103 Fed. 837. It has been held that it was not properly taken, if not reduced to writing, under sections 863 and 864 (Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491; Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29), and not admissible in evidence.

In Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495, the questions and answers were taken stenographically, but were not reduced to writing in presence of witness, or read over to him after they had been written out. They were not admissible. Ibid. See Re Thomas, 35 Fed. 822. When completed, whether taken down by a stenographer or written down by the examiner, he should read it over to the witness, or it should be read over to the witness in the presence of the examiner, and be signed by the witness in the presence of the examiner. U. S. Rev. Stat. sec. 864 (Comp. Stat. 1913, sec. 1473.)

Equity rule 51. If the witness refuses to sign, the examiner shall sign them, stating in the record the reasons, if any, given by the witness why he did not sign (equity rule 51); and he may state any other special matters that he may think fit to be presented in the report of his action.

How Authenticated and Transmitted.

Equity rule 49 provides that all evidence offered and objections made shall be saved and returned into court. Section 865, U. S. Rev. Stat., provides for the transmission by the officer of the depositions to the court, either in person or by mail. This section provides that the magistrate taking the deposition shall deliver it with his own hand into the court for which it is taken, or it shall, together with a *certificate of the reasons* for taking it, and of the notice, if any, given to the parties, be sealed up and directed to the court, and remain under seal until opened in court. See "Mailing Depositions." As to certificate of officer see "Defective Certificate," p. 540. *Re Thomas*, 35 Fed. 340, 824; *The Saranac*, 132 Fed. 942; *Stewart v. Townsend*, 41 Fed. 121; see *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 248. (See chap. 84, p. 534).

CHAPTER LXXXIV.

RETURNING AND FILING DEPOSITIONS.

As we have seen, new rule 49 is the only rule governing the returning of depositions to the court by the officer taking them, so the method of returning must be followed as provided by section 865 of the Revised Statutes of the United States (Comp. Stat. 1913, sec. 1474), and they cannot be held back under instructions from counsel of the party on whose behalf the witness was examined. *First Nat. Bank v. Forest*, 44 Fed. 246.

Returning by Mail.

The envelop should be addressed to the clerk of the court issuing the commission, marked with the style of the case, sealed, and the commissioner taking should indorse his name across the seal. *Egbert v. Citizens Ins. Co.* 2 McCrary, 386, 7 Fed. 47; *Stewart v. Townsend*, 41 Fed. 121. It may then be sent by mail or express; the rule requires it simply to be transmitted. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 604; *Batts's Rev. Stat. (Tex.)* 2286. See *Re Thomas*, 35 Fed. 337, 340; *Brown v. Ellis*, 103 Fed. 836.

Publication of Depositions.

Equity rule 55 provides that on the filing of any deposition or affidavit taken under the new rules or any statute, it shall be deemed published unless otherwise ordered by the court.

Exhibits.

When exhibits are offered in connection with testimony, they must be attached, and if *copies*, the officer must certify that he has compared the copies with original. *The Holladay Case*,

27 Fed. 842. It is not necessary to place a certificate on the exhibits, but they may be referred to in the certificate to the depositions, and the commissioner may send them in a separate envelop (Bird v. Halsy, 87 Fed. 672; Dundee Mortg. & T. Invest. Co. v. Cooper, 26 Fed. 670, 671; United States v. 50 Boxes & Packages of Lace, 92 Fed. 601); or they may be identified in any manner that will make certain the fact that they are the paper offered in connection with the evidence (ibid.); and mailing them in separate packages is permissible (Bird v. Halsy, 87 Fed. 671, 672).

Depositions to Foreign Countries.

Sections 863 and 864 of the United States Revised Statutes (Comp. Stat. 1913, secs. 1472, 1473) refer to taking depositions within the United States, as is clearly shown by the designation of the officers authorized to take them. Encyclopædia Britannica Co. v. Werner Co. 138 Fed. 461; Bird v. Halsy, 87 Fed. 667; Cortes Co. v. Tannhauser, 21 Blatchf. 552, 18 Fed. 667; The Alexandra, 104 Fed. 904. In Stein v. Bowman, 13 Pet. 209, 10 L. ed. 129, it was said that the only method by which depositions can be taken in a foreign country is by a commission, and in Cortes Co. v. Tannhauser, 21 Blatchf. 552, 18 Fed. 667, it is said the proper course is by commission, but where notice that oral examinations would be required in the case has been given, that the evidence may be so taken in a foreign country. Edison Electric Co. v. Westinghouse, C. K. Co. 138 Fed. 460, 461, following Bischoffsheim v. Baltzer, 20 Blatchf. 229, 10 Fed. 1.

Commissions to take evidence in a foreign country may issue under a *dedimus* pursuant to the provisions of U. S. Rev. Stat. sec. 866 (Comp. Stat. 1913, sec. 1477). (Ibid.; United States v. 50 Boxes & Packages of Lace, 92 Fed. 602, 603); or by order under equity rule 47 (Bischoffsheim v. Baltzer, 20 Blatchf. 229, 10 Fed. 4. See Hollander v. Baiz, 40 Fed. 659, s. c. 43 Fed. 35); or under the forms provided by State statutes (United States v. 50 Boxes & Packages of Lace, 92 Fed. 603, 604); or under "Letters Rogatory" (U. S. Rev. Stat. sec. 875).

Before Whom Taken.

By sec. 1750 of the Revised Statutes of the United States (Comp. Stat. 1913, sec. 3211), it is provided that depositions may be taken in foreign countries before any secretary of legation or consular officer within the limits of his legation, consulate, or commercial agency, and it is further provided that such officers may perform any notarial act which a notary public may perform in this country, and when the depositions are so taken and certified under the seal of office of such officer, they shall be as valid as if taken in the United States under the laws thereof. *Bischoffsheim v. Baltzer*, 20 Blatchf. 229, 10 Fed. 4; *Cortez Co. v. Tannhauser*, 21 Blatchf. 552, 18 Fed. 667.

Letters Rogatory.

By U. S. Rev. Stat. sec. 875 (Comp. Stat. 1913, sec. 1486), evidence may be taken in a foreign country, either by commission or letters rogatory, in any suit in which the *United States is a party*, or has an interest, and by sections 4071 to 4074 (Comp. Stat. 1913, secs. 7619-7622), it provided for taking the testimony of witnesses in this country upon letters rogatory addressed to any circuit court of the United States by any court of a foreign country. The circuit court to which the letters are addressed will designate a commissioner to take the testimony required, with all powers necessary to execute the commission.

In *Gross v. Palmer*, 105 Fed. 833, it is said that letters rogatory may issue from a circuit court where testimony cannot otherwise be obtained, but it must be shown with certainty that a commission is not adequate.

Letters rogatory are prepared in the name of the President of the United States and addressed to the presiding officer of some court of record of a foreign country, stating the pending of a suit in a court of the United States and suggesting certain parties (naming them) are within the jurisdiction of the foreign court and are material witnesses in the pending cause.

Then follows a request that by the usual process of the foreign court the parties named be brought before the court, or some competent person appointed by the court, to be examined on the interrogatories and cross-interrogatories annexed to the letter; that the answers be taken in writing

and returned, addressed to the clerk of the court where the cause is pending. They are to be sealed up with the letter rogatory and returned.

The teste to the letter rogatory should be:

Witness the....., Chief Justice of the United States, this..... day of....., A. D. 19..., and the.....year of the independence of the United States of America.

Attest:

Clerk of the.....

(SEAL.)

(Court in which suit is pending.)

If issued from a district court of the United States, it shall bear teste of the judge and attested by the clerk of the court as above.

When executed by the court or commissioner to whom directed, it must be returned to the minister or consul of the United States nearest to the place where executed, who is to indorse on it a certification when and where it was received, and the condition in which he received it, and he shall then transmit the letter on commission so executed and certified, to the clerk of the court from whence it issued.

CHAPTER LXXXV.

SUPPRESSING DEPOSITIONS.

The requirements of the laws under which depositions are taken must be complied with (*Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174), and the certificate of the officer taking should show compliance as to the manner of taking, as already explained. Formerly the rulings were very strict because of the fact that under the 30th section of the act of 1789 they could be taken without notice, but now, notice being required, the rule may be stated as follows: If the right to take the deposition exists, and notice has been given, so that the opportunity for cross-examination has been secured, then the objection must be substantial to be sustained. *Kansas City, Ft. S. & M. R. Co. v. Stone*, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656; *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 822; *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288-290.

A motion to suppress evidence taken in rebuttal will not be granted if there is any evidence in rebuttal in the deposition. *West Pub. Co. v. Edward Thompson Co.* 152 Fed. 1019.

Subject to the above rule every step in the taking of depositions can be excepted to with a view to suppressing the depositions.

First. As to notice of taking.—While proper notice of taking as to time and place must be given, yet attending an examination waives all irregularities, and allowing the deposition to be read without objection at the trial, though a motion to suppress before the trial has been made and overruled, waives any objection to the manner of taking. *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 291; *Ray v. Smith*, 17 Wall. 411, 21 L. ed. 666. In *Gartside Coal Co. v. Maxwell*, 20 Fed. 187, it is said that depositions will not

be suppressed though taken at a different place from the one named in the notice, if both parties are present when taken. *Bird v. Halsy*, 87 Fed. 672; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L. R. A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 732; *Brown v. Ellis*, 103 Fed. 837; *Gormley v. Bunyan*, 138 U. S. 632, 34 L. ed. 1089, 11 Sup. Ct. Rep. 453.

New rule 54 provides that in case notice of taking depositions has not been given, to the opposite party, of the time and place of taking, he shall, on application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken, with notice, as the court or judge under the circumstances shall order.

Reasonable Notice.

What constitutes reasonable notice in point of time depends on the circumstances in each case. *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961; *The Serapis*, 49 Fed. 393; *Uhle v. Burnham*, 44 Fed. 729. Where a mistake is made in the name of the witness in the order for examination, but the opposite party had reasonable notice of the time and place of taking, it would not be a ground for suppressing the deposition. *Bibb v. Allen*, 149 U. S. 488, 37 L. ed. 822, 13 Sup. Ct. Rep. 950; *Brown v. Ellis*, 103 Fed. 836; *United States v. Pings*, 4 Fed. 714.

When Defectively Taken.

If the depositions are defectively taken, a motion to suppress must be made at once, or it will waive the objection to form and manner of taking. *Samuel Bros. v. Hostetter Co.* 55 C. C. A. 111, 118 Fed. 257; *Stegner v. Blake*, 36 Fed. 184. Thus, where the commissioner attached copies of the exhibits, instead of the originals, and marked them for identification, without saying he had compared them, the objection must be met by motion to suppress before the hearing, or it is waived. *The Holladay Case*, 27 Fed. 842; *Insurance Co. of N. A. v. Guardiola*, 129 U. S. 643, 32 L. ed. 803, 9 Sup. Ct. Rep. 425. *Blackburn v. Crawford*, 3 Wall. 191, 192, 18 L. ed. 192, 193.

So a motion to suppress because defectively taken, filed one month after cause is set for hearing, comes too late. *Ibid.* Setting the cause for hearing waives technical objections. The Holladay Case, 27 Fed. 842, 843, and cases cited. *Blackburn v. Crawford*, 3 Wall. 191, 192, 18 L. ed. 192, 193.

Where cross interrogatories were not answered, the deposition will not be suppressed if the motion comes too late to re-take them. *Rahtjen's American Composition Co. v. Holzapfel's Compositions Co.* 97 Fed. 949. So when defectively taken, objections are waived if allowed to be used. *Indianapolis Water Co. v. American Straw-Board Co.* 65 Fed. 534; *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288; *Ray v. Smith*, 17 Wall. 417, 21 L. ed. 669, or counsel present when taken, *Brown v. Ellis*, 103 Fed. 834, and not excepting.

When the brother of the attorney took the depositions, it was held that the depositions could be read. And where the attorney wrote the answers, while irregular, yet no fraud being shown, the court would not suppress. *Missouri, K. & T. R. Co. v. Byas*, 9 Tex. Civ. App. 572, 29 S. W. 1122. However, it was intimated otherwise in *Dawson v. Poston*, 28 Fed. 606; *United States v. Pings*, 4 Fed. 714.

Witness Adopting Previous Answers.

A witness on his second examination read over a copy of his testimony given previously and subscribed it as his deposition. This was held not to render the deposition inadmissible. *Samuel Bros. v. Hostetter Co.* 55 C. C. A. 111, 118 Fed. 257.

Defective Certificate.

A commissioner taking depositions in a foreign country, who fails to certify that the examination was "subscribed by the sworn interpreter," as directed, is immaterial if the certificate shows the interpreter was sworn. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601.

Where the notary certifies that he is not attorney for either party, omission to certify that he is not interested in the event

of suit is not sufficient cause to suppress. *Stewart v. Townsend*, 41 Fed. 121. See also *Giles v. Paxson*, 36 Fed. 882. In *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 248, where the name of the witness was not rightly given, but there was no doubt from the record who was intended, the deposition was not suppressed.

In *Stegner v. Blake*, 36 Fed. 184, the defect in the certificate was a want of a statement of the cause of taking. Such defect was waived because not taken before final hearing. *Bird v. Halsy*, 87 Fed. 672.

In *Brown v. Ellis*, 103 Fed. 834, it is held that depositions for use in the Federal court under U. S. Rev. Stat. secs. 863–865 (Comp. Stat. 1913, secs. 1472–1474), and under a commission to a notary public, his official seal to the certificate is not essential.

Again, where a commission issued to A. C. Strong, the depositions are not inadmissible because certified by Alfred C. Strong. *Ibid*.

See *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 245. (See “Informality of Certificate.”)

Will Be Suppressed.

When taken after the time allowed. *Re Thomas*, 35 Fed. 337. When a witness is re-examined before an examiner on the same matter without an order of court. *Thurber v. Cecil Nat. Bank*, 52 Fed. 515. So when taken by a party before he becomes party to the suit. *Riviere v. Wilkens*, 31 Tex. Civ. App. 454, 72 S. W. 608.

So where a party declines to introduce his witness for cross-examination, the direct examination will be suppressed. So when answers taken stenographically, and not reduced to writing in the presence of the witness, or read over to him. *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491; *Cook v. Burnley*, 11 Wall. 668, 20 L. ed. 30. But see *Bird v. Halsy*, 87 Fed. 677, not applying rule to depositions taken in a foreign country. So when witness refuses to answer a material question. *Bird v. Halsy*, 87 Fed. 674. But not where no effort is made to make him answer, and no notice or intention to suppress, and two terms intervene before a

motion to suppress is made. *Ibid.* But it seems exception must be noted before examiner. *Ibid.* Doane v. Glenn, 21 Wall. 35, 22 L. ed. 476; McClaskey v. Barr, 48 Fed. 138. While you can not prevent a party from taking irrelevant testimony, yet they will be suppressed if none of the answers are relevant. Griffith v. Shaw, 89 Fed. 313; First Nat. Bank v. Rush, 29 C. C. A. 333, 56 U. S. App. 556, 85 Fed. 541.

Motion to Suppress.

As before seen, in stating the cause for suppressing depositions, the motion must be made before the case is called for trial at law. Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; Bird v. Halsy, 87 Fed. 672; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; Stegner v. Blake, 36 Fed. 184. There must be given an opportunity to correct the deposition, or the defects in taking, to which objections have been made. *Ibid.*; Doane v. Glenn, 21 Wall. 35, 22 L. ed. 476; McClaskey v. Barr, 48 Fed. 138; The Holladay Case, 27 Fed. 842; New York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 113, 114, 18 L. ed. 172; Shutte v. Thompson, 15 Wall. 160, 21 L. ed. 126; Samuel Bros. v. Hostetter Co. 55 C. C. A. 111, 118 Fed. 257. This rule, it is said, may be relaxed when returned just before trial. New York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107-114, 18 L. ed. 170-172.

In equity all technical objections must be presented by motion before the case is set for hearing. (Authorities above.) Where the evidence is irrelevant, or other substantial objection exists, as being hearsay, secondary, or irresponsive, it may be taken when evidence is offered at the hearing, and not by motion to suppress. First Nat. Bank v. Rush, 29 C. C. A. 333, 56 U. S. App. 556, 85 Fed. 542; Lott v. King, 79 Tex. 293, 15 S. W. 231. When a motion to suppress is necessary, it is only necessary to state specifically the grounds upon which it is based, and a prayer to suppress, and to be filed, as indicated above, in such time that opportunity for curing the defect may be given.

Effect of Death On.

A deposition of a party as to transactions with another party, taken while the latter is alive, may be used when the suit is revived in the name of his representatives. *Sheidley v. Aultman*, 18 Fed. 666; *McMullen v. Ritchie*, 64 Fed. 253, 266; *See Ruch v. Rock Island*, 97 U. S. 694, 24 L. ed. 1101; *United States L. Ins. Co. v. Ross*, 42 C. C. A. 601, 102 Fed. 722. And this, too, though the party with whom the transaction was had dies before his evidence was taken. *Ibid.* As to offering testimony of deceased witness at law see *Nome Beach Lighterage & Transp. Co. v. Standard M. Ins. Co.* 156 Fed. 484, 485, and cases cited.

When Destroyed.

When the depositions are destroyed by fire or other accident, copies may be used, though the witness be living. U. S. Rev. Stat. secs. 899, 900 (Comp. Stat. 1913, secs. 1513, 1514). *Stebbins v. Duncan*, 108 U. S. 46, 27 L. ed. 646, 2 Sup. Ct. Rep. 313. *See Ruch v. Rock Island*, 97 Fed. 693, 124 L. ed. 1101, as to reproducing the evidence of deceased witness.

Evidence in a Former Case.

Evidence taken in a former case is only secondary and is incompetent unless a foundation is laid, as, that the witnesses are dead or unavoidably absent. *Ecaubert v. Appleton*, 15 C. C. A. 73, 35 U. S. App. 221, 67 Fed. 917; *Dover v. Greenwood*, 177 Fed. 947; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 107, 137 Fed. 706; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 49.

CHAPTER LXXXVI.

DEPOSITIONS ON LAW SIDE.

Before closing the discussion of depositions, I wish to briefly speak of depositions *de bene esse* taken in a cause at law in the Federal courts. We have seen that sec. 863, United States Revised Statutes (Comp. Stat. 1913, sec. 1472), provides for taking depositions when the witness lives at a greater distance than one hundred miles from the place of trial, or is bound on a sea voyage, or about to go out of the United States, or when aged and infirm, or when a single witness to a material fact. *Bird v. Halsy*, 87 Fed. 676, 677; *Lowrey v. Kusworm*, 66 Fed. 539; see *Frost v. Barber*, 173 Fed. 847; *Zych v. American Car & Foundry Co.* 127 Fed. 724. We have seen that this statute applies in equity as well as law (*Stegner v. Blake*, 36 Fed. 184), but that in its application in equity the provisions other than the clause referring to the distance of the witness from the place of trial were the grounds for taking the depositions in equity *before* issue joined only.

At law, unless one or more of these conditions exist, you cannot take the evidence of a witness *by deposition* in the United States courts, but must have him at the trial, to be examined orally. *Ibid.*; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 107, 137 Fed. 705, 706; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516; *National Cash Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 957, 958; *Henning v. Boyle*, 112 Fed. 397; *Hartman v. Feenaughty*, 139 Fed. 888; *Importers' & T. Nat. Bank v. Lyons*, 134 Fed. 510, 511. But it seems the rule does not apply when depositions are taken in answer to a rule to show cause where facts disputed. *Importers' & T. Nat. Bank v. Lyons*, 134 Fed. 512. This has not been the practice in the Federal courts sitting in Texas, for depositions have been taken and read under the State prac-

tice, and without objection. This practice was evidently based upon a rule adopted in 1872 in the western district of Texas (equity rule 15), permitting depositions to be taken as in the State courts (*Warren v. Younger*, 18 Fed. 859), and in 1880 in the northern district of Texas upon a similar rule, promulgated by Judges Woods and McCormick. *Ibid.* However, the rule as promulgated conflicts with the act of Congress, and is not now the practice.

In 1892, as before stated, Congress permitted depositions to be taken in the mode prescribed by the State laws and practice, but, as we have before seen, this merely simplified the practice without enlarging the conditions under which depositions could be taken in the Federal courts. *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 957; *National Cash Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502, s. c. 77 Fed. 242; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897. This act of 1892 has been frequently construed, and, without further discussion, I will give the rules that have been evolved, which control the practice on the law side of the Federal courts in taking the testimony of witnesses by deposition.

First. The State statutes do not affect the causes or grounds for taking depositions on the law side. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601.

Second. That depositions taken from a witness living within one hundred miles from the place of trial cannot be read in evidence, and the distance is to be determined by taking the ordinary, usual, and shortest route of public travel (*Jennings v. Menaugh*, 118 Fed. 612; see authorities above; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 732; *Texas & P. R. Co. v. Reagan*, 55 C. C. A. 427, 118 Fed. 817; *Whitford v. Clark County*, 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306), unless the witness was aged and infirm, or the ground for taking came under the other conditions of sec. 863, *United States Revised Statutes*.

Third. That the act of 1892 did not change this rule. *Shellabarger v. Oliver*, 64 Fed. 306; *Seeley v. Kansas City Star Co.* 71 Fed. 555; *National Cash Register Co. v. Leland*, 77 Fed. 242.

Fourth. That even where the depositions have been taken,
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in a State court, of a witness who lives within one hundred miles of the place of trial, they cannot be read in the Federal court when the case has been removed thereto, if the suit be at law (*Ibid.*; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 59), unless the witness was dead when offered. (*United States L. Ins. Co. v. Ross*, 42 C. C. A. 601, 102 Fed. 722; *Toledo Traction Co. v. Cameron*, *supra.*)

The words "must live a greater distance than one hundred miles" has been construed to mean that when the deposition was taken, where the witness was at the time found sojourning, or abiding for his health, was the point to which the distance was calculated, in order to determine its admission (*Mutual Ben. L. Ins. Co. v. Robison*, 22 L. R. A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 724), and it seems courts will take judicial notice of the distance. (*Ibid.* 732.)

Fifth. It cannot be taken before trial, but orally in court. *Importers' & T. Nat. Bank v. Lyons*, 134 Fed. 511.

Sixth. Though deposition taken, it cannot be read if the witness is in court. U. S. Rev. Stat. sec. 865 (Comp. Stat. 1913, sec. 1474); *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958. But this rule not applicable to depositions taken under a *dedimus*. *Ibid.*

Special Federal Statutes Controlling Evidence.

I will here add without discussion reference to certain special statutes affecting the admission of record evidence in the trial of civil causes in the Federal courts.

U. S. Rev. Stat. secs. 883 to 896 (Comp. Stat. 1913, secs. 1495-1498, 1500-1509), provide for the admission of copies of all documents from the various departments of the government. *United States v. Brelin*, 92 C. C. A. 88, 166 Fed. 104.

Sections 899 to 901 provide for restoring lost judgments and records of the Federal courts and their admission as evidence. *Cornett v. Williams* (*Nash v. Williams*) 20 Wall. 226, 22 L. ed. 254; *O'Hara v. Mobile & O. R. Co.* 22 C. C. A. 512, 40 U. S. App. 471, 76 Fed. 718; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561; *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

Section 905 provides for the admission in evidence of acts of the State legislation, also the records and judicial proceedings of the courts of States and Territories, and how they are to be authenticated or proved. *Israel v. Israel*, 130 Fed. 237; *Bohlander v. Heikes*, 94 C. C. A. 298, 168 Fed. 886; *National Acci. Soc. v. Spiro*, 37 C. C. A. 388, 94 Fed. 750.

Section 906 provides for the admission of all records, and exemplification of books, which may be kept in any public office of any State or Territory not appertaining to a court. *Williams v. United States*, 137 U. S. 113, 34 L. ed. 590, 11 Sup. Ct. Rep. 43.

Section 907 provides for the admission of copies of foreign records relating to land titles in the United States.

Section 908 provides that the publication of the laws and treaties of the United States by Little, Brown & Co. shall be competent evidence of the public and private acts of Congress and of the treaties therein contained, in all courts of law and equity of the United States and the several States without further proof.

Who May Use the Deposition.

One may use any part of a deposition taken by the other side. *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 827, and cases cited.

Cost Allowed in Taking and Reading.

U. S. Rev. Stat. sec. 824 (Comp. Stat. 1913, sec. 1378); *Matheson v. Hanna-Schoelkopf Co.* 128 Fed. 163; *L. E. Waterman Co. v. Lockwood*, 128 Fed. 174; *United States use of Hudson River Stone Supply Co. v. Venable Const. Co.* 158 Fed. 833; *Kissinger-Iron Co. v. Bradford Belting Co.* 59 C. C. A. 221, 123 Fed. 91; *Missouri v. Illinois*, 202 U. S. 598, 50 L. ed. 1160, 26 Sup. Ct. Rep. 713; *Ingham v. Pierce*, 37 Fed. 647; *Broyles v. Buck*, 37 Fed. 137.

CHAPTER LXXXVII.

DISMISSAL BY THE COURT.

Having brought the cause up to the point of final hearing, I will again call your attention to the fact that it is the duty of the court to guard against imposition upon its jurisdiction, and to dismiss the cause whenever it appears from the record that its jurisdiction has been imposed upon. Section 5 of the act of 1875, 18 Stat. at L. 470, chap. 137 (Comp. Stat. 1913, sec. 1019), provides that *at any time* after filing a suit in the United States court, it should appear that such suit does not *substantially involve a suit or controversy properly within the jurisdiction of the court*, or that parties have been collusively or improperly joined in order to make a case cognizable in the Federal court, the court shall proceed no further, but shall *dismiss the case*. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 287, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; *Pennsylvania Co. v. Bay*, 138 Fed. 205 and cases cited. *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 647. Judicial Code, sec. 37 (Comp. Stat. 1913, sec. 1019); *Baum v. Longwell*, 200 Fed. 450.

It is seen by this act that it is a duty devolving upon the court without reference to the action of counsel, to dismiss the case if it comes within the condemnation of the act, and does not substantially involve a controversy properly within the jurisdiction of the court, and this duty is mandatory, when the conditions authorizing a dismissal are apparent, or developed by the facts in the trial of the case. *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Briggs v. Traders' Co.* 145 Fed. 254; *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 623; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992; *Minnesota v. Northern Securities Co.* 194 U. S. 65, 66, 48 L. ed. 878, 879, 24 Sup. Ct. Rep. 598; *Steigleder v. McQuesten*, 198 U.

S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; *Wetmore v. Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; see *Howe v. Howe & O. Ball Bearing Co.* 154 Fed. 822, and cases cited. The provision is a salutary one (*Williams v. Notawa*, 104 U. S. 212, 26 L. ed. 720), and evidently intended to confine the Federal courts within the limits of the jurisdiction as enlarged by the jurisdictional and removal act of 1875. *Simon v. House*, 46 Fed. 319; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

Under section 5 of the act of 1875, 18 Stat. at L. 470, chap. 137 (Comp. Stat. 1913, sec. 1019), the court will, of its own motion, dismiss a case where the jurisdictional ground is not apparent in the bill. *Carlsbad v. Tibbetts*, 51 Fed. 852; *Tinsley v. Hoot*, 3 C. C. A. 612, 2 U. S. App. 548, 53 Fed. 682; *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Metcalf v. Watertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 647; *Anderson v. Bassman*, 140 Fed. 12, 13. (See chapter 35.) But I wish briefly, but more particularly, to discuss the dismissal of the suit by the court when the evidence taken in the case develops the absence of jurisdiction.

Prior to 1875, as has been before stated, when the jurisdictional fact was properly alleged, though untrue, it could only be attacked by plea, and a plea to the merits waived it. *Jones v. League*, 18 How. 81, 15 L. ed. 264; *Hartog v. Memory*, 116 U. S. 590, 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521. But since the statute, a plea is not absolutely necessary to dismiss if during the progress of the cause, or at the final hearing, the want of jurisdiction is made apparent; the court is required to dismiss without any suggestion of counsel.

But the question arises, how and to what extent it must be made apparent that there is a want of jurisdiction, in order to invoke the action of the court, when there is no plea, or the issue not raised. The rule seems to be that the facts upon which the court will act must amount to a *legal certainty*; that a mere impression, though it may amount to a moral certainty that the jurisdiction has been imposed upon, will not be sufficient to require the court to dismiss the case under the act,

and it is held that this is the true interpretation of the words of the fifth section, "that it should appear to the satisfaction of the court." Ibid.; *Barry v. Edmunds*, 116 U. S. 559, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Gubbins v. Laughtenschlager*, 75 Fed. 621; *Howe v. Howe & O. Ball Bearing Co.* 83 C. C. A. 536, 154 Fed. 820; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Hayward v. Nordeberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 6-10; *Deputron v. Young*, 134 U. S. 252, 33 L. ed. 929, 10 Sup. Ct. Rep. 539. It may be made apparent by affidavit; no distinct method stated. *Morris v. Gilmer*, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Anderson v. Bassman*, 140 Fed. 13.

Then it may be said that the provisions of section 5 do not avoid, unless there appears from the evidence a *legal certainty* that the jurisdiction has been imposed upon. But this would not be the rule, if you pleaded to the jurisdiction; only the preponderance of proof, or the *reasonable certainty*, would be sufficient to support a dismissal of the cause under a plea. Ibid.; in *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521, it is said that to attack the jurisdiction by evidence, you must plead it (*Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 181, 26 L. ed. 1036, and *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539). It is said, if the jurisdictional allegation is not traversed, no question involving the capacity of the party to sue can be made. *Kennedy v. Solar Ref. Co.* 69 Fed. 717; see *Hewitt v. Story*, 39 Fed. 160, 161. In the light of the fifth section of the act of 1875, these cases must mean that if you do not plead to the jurisdiction, you cannot offer any direct evidence showing a want of jurisdiction, and that the proof to create the legal certainty upon which the court can act must clearly appear from the evidence legitimately drawn out on the other material issues in the case. Ibid.

To illustrate, we will assume that the case rests upon diversity of citizenship for jurisdiction, which is properly, but not truly, alleged; no plea is interposed, but perhaps the question may be directly asked as to the citizenship of a party; there being no issue, the answer could not be used upon which to base the dismissal, but should the same fact be developed

in the answers to questions on material issues in the case, then it would be sufficient to sustain a dismissal of the cause.

For Want of Parties.

The court may dismiss of its own motion when it appears that an indispensable party has not been joined, and when the joinder would defeat jurisdiction. *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 631, 20 L. ed. 83; *Taylor v. Holmes*, 14 Fed. 515; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160. Or where indispensable parties cannot be served. *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 159, and cases cited. Or the court may dismiss at the hearing for want of parties, where the objection has been made at the beginning of the suit, and the plaintiff has failed to set it down for hearing on the objection, and it appeared at the trial the objection was well taken. Equity rule 43; *Olds Wagon Works v. Benedict*, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 5; See *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382-384, 28 L. ed. 463, 464, 4 Sup. Ct. Rep. 510.

So the court will dismiss a bill when it appears that pending the suit the plaintiff has parted with his title, and no bill in the nature of a supplemental bill has been filed. *Campbell v. New York*, 35 Fed. 14; *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 325; *Brown v. Fletcher*, 140 Fed. 639; *Miller v. Wattier*, 165 Fed. 362. But the dismissal should be without prejudice (*Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061), because a general dismissal would create the presumption that it was on the merits. *Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 964; see *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111.

Want of Equity.

If on the trial the case shows that there is no equity in the bill, and the jurisdiction of the court was not sought in *good faith*, the court will of its own motion dismiss the bill (*Fougeres v. Jones*, 66 Fed. 316; *Mitchell v. Dowell*, 13 Fed. 141,

s. c. 105 U. S. 432, 26 L. ed. 1143; *Cherokee Nation v. Southern Kansas R. Co.* 33 Fed. 915; *Alger v. Anderson*, 92 Fed. 710; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Kramer v. Cohn*, 119 U. S. 357, 30 L. ed. 440, 7 Sup. Ct. Rep. 277; see "Adequate Remedy at Law"), but without prejudice to a suit at law. (*Sanders v. Devereux*, 8 C. C. A. 629, 19 U. S. App. 630, 60 Fed. 311).

By new rule 22, if at any time it appears that a suit commenced in equity should have been brought at law, it shall forthwith be transferred to the law side to be tried there after recasting the pleadings if necessary. However, since the promulgation of the above rule, Congress on March 3d, 1915, added sec. 274 (a) to the Judicial Code as follows:

"Cl. 1. In case said courts shall find that a suit at law should have been brought in equity, or a suit in equity should have been brought at law, the court shall order any amendments to the pleading necessary to conform them to the proper practice. Any party may amend his pleadings to obviate the objection that his suit is brought on the wrong side.

"Cl. 2. The cause shall proceed and be determined upon such amended pleadings, and all evidence taken in the case before the amendment is admissible."

It will be noticed under this act, *that at any stage of the cause*, the objections mentioned in the act may be obviated by amendment, and the trial proceed on the pleadings as amended.

Assuming that the objections are made after the case has gone to trial in a court of law, or equity; in the one case with a jury, and in the other case without a jury, what order should be made if the objection is sustained? In the light of past decisions, if the case is brought on the equity side when it should have been brought at law, and the pleadings are amended to conform to a lawsuit and the case proceeds as at law, the court must respect the constitutional right of a trial by jury, and order a jury, if not waived by consent in writing by both parties. See *Jury*. This perhaps would stop the proceedings until a jury could be impaneled. On the other hand, if the suit is brought at law and on trial before a jury, when it should have been brought in equity, and by the amended pleadings it must proceed as a suit in equity, there would be no objection to the court proceeding with the case before the jury, under the

power of a chancellor to submit the issues of fact in an equity cause to a jury—not, however, being bound by the verdict as at law. Where no real dispute remains, the court may dismiss. *Allen v. Georgia*, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Lewis Pub. Co. v. Wyman*, 104 C. C. A. 453, 182 Fed. 14; see *Robinson v. American Car & Foundry Co.* 132 Fed. 166.

When Collusively Obtained.

The fifth section of the act of 1875 says the court must guard itself against fraudulent collusion to obtain jurisdiction. This means combination of any kind by which jurisdiction is obtained fraudulently (*Coffin v. Haggin*, 7 Sawy. 509, 11 Fed. 224); and when the evidence discloses the fact (*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 342, 40 L. ed. 450, 16 Sup. Ct. Rep. 307; *Cilley v. Patten*, 62 Fed. 500; *Hayden v. Manning*, 106 U. S. 588, 27 L. ed. 306, 1 Sup. Ct. Rep. 617; *Marvin v. Ellis*, 9 Fed. 367); or where the ground for jurisdiction sought is frivolous or fictitious (*Douglas v. Wallace*, 161 U. S. 348, 40 L. ed. 728, 16 Sup. Ct. Rep. 485; *Hamblin v. Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; see *Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 91, 52 L. ed. 403, 28 Sup. Ct. Rep. 219, and *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Pennsylvania Steel Co. v. New York City R. Co.* 157 Fed. 441). Thus collusive assignments will be ground for dismissal (*Farmington v. Pillsbury*, 114 U. S. 144–146, 29 L. ed. 116, 117, 5 Sup. Ct. Rep. 807; *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 656; *McLean v. Clark*, 31 Fed. 501, 502; *Norton v. European & N. A. R. Co.* 32 Fed. 865; *Detroit v. Dean*, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; *Turnbull v. Ross*, 72 C. C. A. 609. 141 Fed. 649–652, and cases cited. *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 282; *Lake County v. Dudley*, 173 U. S. 253, 43 L. ed. 688, 19 Sup. Ct. Rep. 398, and cases cited. *Greenwalt v. Tucker*, 10 Fed. 884; *Coffin v. Haggin*, 7 Sawy. 509, 11 Fed. 219; *Fountain v. Angelica*, 12 Fed. 8); or fraudulent making of parties; or when the case

is dishonestly brought to force a compromise which develops in the evidence (*ibid.*), it is the duty of the court to exercise the power (*Simon v. House*, 46 Fed. 319; *Williams v. Nottawa*, 104 U. S. 212, 213, 26 L. ed. 720, 721; *Hartog v. Memory*, 116 U. S. 590, 29 L. ed. 726, 6 Sup. Ct. Rep. 521); and if the court should suspect the conditions as stated above to exist, it should institute proceedings of its own motion to discover it (*Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289); but collusive arrangements will not be inferred. (*Ashley v. Presque Isle County*, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55, 56; *Mills v. Chicago*, 143 Fed. 431, 432).

Effect of Dismissal.

A dismissal of a case ordinarily stands on the same footing as a judgment at law, and will be presumed to be final and conclusive unless the contrary appears in the proceedings or decree of the court. *Graves v. Faurot*, 64 Fed. 242; *Stewart v. Ashtabula*, 98 Fed. 518, 519; *Durant v. Essex Co.* 7 Wall. 109, 19 L. ed. 156; *Kilham v. Wilson*, 50 C. C. A. 454, 112 Fed. 573; *Fowler v. Osgood*, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 24. So in all these cases when the objection does not go to the merits of the case the judgment of dismissal should always be "without prejudice." *Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; *American Surety Co. v. Choctaw Constr. Co.* 68 C. C. A. 199, 135 Fed. 487; *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 964; *Sanders v. Devereux*, 8 C. C. A. 629, 19 U. S. App. 630, 60 Fed. 311; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 612, 37 L. ed. 580, 13 Sup. Ct. Rep. 691; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 803; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 255. As to the effect of a judgment "without prejudice," see *Robinson v. American Car & Foundry Co.* 142 Fed. 171.

In determining the effect of the dismissal the opinion may be looked to for ground of dismissal. *Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; see Na-

tional Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111; United States ex rel. Coffman v. Norfolk & W. R. Co. 114 Fed. 686.

For Want of Prosecution.

By new rule 57, where a case has been dropped from the calendar upon continuance by parties, it may, upon application, be reinstated in one year. If no application is made within the time, it will be dismissed without prejudice. When a suit is dismissed by the court for want of prosecution it is not a bar to another suit (Whitaker v. Davis, 91 Fed. 721; Robinson v. American Car & Foundry Co. 142 Fed. 171); nor when dismissed for failure to observe a rule of court (Ryan v. Seaboard R. R. Co. 89 Fed. 397).

Costs on Dismissal.

When a bill is dismissed for want of jurisdiction the court cannot decree costs. Citizens' Bank v. Cannon, 164 U. S. 324, 41 L. ed. 453, 17 Sup. Ct. Rep. 89; see Rucker v. Wheeler, 127 U. S. 92, 32 L. ed. 105, 8 Sup. Ct. Rep. 1142; Hornthall v. The Collector (Hornthall v. Keary) 9 Wall. 566, 567, 19 L. ed. 562. See Westfeldt v. North Carolina Min. Co. 100 C. C. A. 552, 177 Fed. 132.

Continuances of Case by Parties—Effect.

New rules 56 and 57 were intended to force speedy trials by limiting the right to continue the cause beyond the term, after it has been placed on the trial calendar. These rules provide that after the time for taking testimony as fixed by the new rules the case shall be placed on the trial calendar. After being so placed, it may be passed over to another day of the term, but shall not be continued beyond the term save in exceptional cases, upon good cause shown by affidavit, and upon terms the court may deem just. If the continuance is granted by consent, it will be allowed by the court only when the consent is signed by counsel for all the parties and all previous costs paid. If the continuance is granted, the case will be dropped from the

trial calendar, to be reinstated on application within one year. If not so reinstated, the case will be dismissed.

FINAL HEARING.

“Final hearing” is submitting the case on its merits, or on some question the determination of which will finally dispose of the case. *Barron v. The Mt. Eden*, 87 Fed. 483, 484.

Placing the case on the trial calendar under rule 56 is equivalent to setting it down for hearing on the regular call of the docket as at law.

Effect on Previous Orders.

At the hearing all previous orders made in the case are subject to revision, though such changes are seldom made, but affidavits taken before the cause was at issue cannot be used in evidence in the final hearing. *Lilienthal v. Washburn*, 4 Woods, 65, 8 Fed. 707.

CHAPTER LXXXVIII.

MASTERS IN CHANCERY.

By new rule 68, which is substantially the same with old rule 82, the district courts of the United States may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), or special masters *pro hac vice* in any particular case. This rule was amended in 1894 as to the manner of appointment of standing masters only. By act of March 3, 1879, 20 Stat. at L. 415, chap. 179, no clerk of the United States courts, or their deputies, shall be appointed a master in any case, except special reasons shall exist therefor, which are to be assigned in the order of appointment. *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 224.

Nature of the Office.

The master is a judicial officer representing the court in the matter referred to him. *Bate Refrigerating Co. v. Gillette*, 28 Fed. 673. *Dowagiac Mfg. Co. v. Lochven*, 74 C. C. A. 341, 143 Fed. 213, 6 A. & E. Ann. Cas. 573. He derives his powers from the appointment and the rules of equity prescribing his duties, as will be hereinafter set forth, and he need not give bond, nor does the validity of an order appointing him depend on showing an order in the records. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 494.

Who to Be Appointed.

We have seen above that neither clerks nor their deputies can be appointed, except under special circumstances, nor should one be appointed having an interest in or a relationship to the parties to the suit, but, beyond this, anyone learned in the law,

or supposed to be, may be appointed master, and the appointment should be made with reference to his fitness to perform the duties. *Hoe v. Scott*, 87 Fed. 220; *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886; *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525; *Re Thomas*, 35 Fed. 337, 338.

Object and Effect of the Appointment and When the Reference Can be Made.

Under the old rules the appointment was purely discretionary (*Brown v. Grove*, 25 C. C. A. 644, 42 U. S. App. 508, 80 Fed. 564), and when made was impervious to collateral attack (*Elgutter v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 218, 58 U. S. App. 643, 86 Fed. 500). The purpose of the appointment of a master in a case was to economize the time of the court (*Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 704; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 290, 38 L. ed. 165, 14 Sup. Ct. Rep. 343), by assisting in the various proceedings incidental to the progress of the cause (*Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355). But by new rule 59, save in matters of account, it is declared that a reference to a master shall be the exception, not the rule, and shall be made only on a showing that some exceptional condition requires it. The rule clearly contemplates that the court must try the case unless a party to the suit may show good and sufficient cause for a reference. I do not understand that the new rule limits in any way the matters incidental to the progress of the cause that may be referred, but that no reference can be made except on application of one of the parties, showing good cause therefor. Save in matters of account the court cannot abdicate its duty by reference to a master on its own motion, but at the request of either party, for cause, may refer any issue in the case, when necessary to a proper and complete decree, either to a standing or special master. *Brown v. Grove*, 25 C. C. A. 644, 42 U. S. App. 508, 80 Fed. 566; *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 225; *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 225; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882; *Hatch v.*

Indianapolis & S. R. Co. 11 Biss. 138, 9 Fed. 856; Gay Mfg. Co. v. Camp, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68; See *Columbian Equipment Co. v. Mercantile Trust & D. Co.* 113 Fed. 23; *Gunn v. Brinkley Car Works & Mfg. Co.* 13 C. C. A. 529, 27 U. S. App. 779, 66 Fed. 383; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 295, 296.

Reference of the Whole Case by Consent.

There is nothing in the new rule 59 that would prevent the reference of the entire case upon law and fact to a master to report his judgment thereon, where both parties consent in writing and the application is based upon the consent to submit the controversy to such a special tribunal. *Connor v. United States*, 131 C. C. A. 68, 214 Fed. 526, 527; *Kimberly v. Arms*, 129 U. S. 512-530, 32 L. ed. 764-771, 9 Sup. Ct. Rep. 355; *Garinger v. Palmer*, 61 C. C. A. 436, 126 Fed. 910, 911; *Cleveland v. United States*, 62 C. C. A. 393, 127 Fed. 670. See *Effect of Masters Report when Reference by Consent*, chap. 90, p. 576.

Form of Reference.

Should the court grant the application for reference to a master, it may be prepared as follows:

Title as in bill.

This cause coming on to be heard on the pleadings (or pleadings and proof; or on motion of..... to submit the issues to a master to take and report the evidence thereon, etc.), and both parties appearing by counsel, and the court having considered the same and being of opinion that it is necessary to take an account (or whatever is necessary to be referred), it is therefore ordered, adjudged and decreed that this cause be referred to the Hon., standing master of this court (or that, Esq., be appointed a special master in chancery to whom shall be submitted, etc.), to ascertain and report (here set forth what the master has to investigate and report).

It is further ordered, adjudged and decreed that the master do make and file his report by the.....day of....., A. D. 19..., with the clerk of this court to await the further order of this court.

Judge, etc.

See *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 325, for order appointing a Special Master.

There can be no reference on the law side. *Gunn v. Brinkley Car Works & Mfg. Co.* 13 C. C. A. 529, 27 U. S. App. 779, 66 Fed. 383; *Cleveland v. United States*, 62 C. C. A. 393, 127 Fed. 670; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 296. See *Dartmouth College v. International Paper Co.* 132 Fed. 89. May appoint an auditor. *Fenno v. Primrose*, 56 C. C. A. 313, 119 Fed. 801.

It must show without the least ambiguity what is referred to the master, and should determine clearly the scope of authority, and beyond this, parties cannot consent to have him pass on any matter not in the line of the order of reference. *Taylor v. Robertson*, 27 Fed. 537. If the matter is by consent, and submits the whole case to the decision of the master, then you may use the following form of order:

This cause coming on to be heard upon the application of both parties to refer the issues both of law and fact to a master for his investigation and decision, and it appearing to the court that said cause is at issue and both parties are present, consenting to the reference (or a written consent of reference is on file in the cause), it is therefore ordered, adjudged and decreed that said cause with its pleadings, evidence and exhibits, be referred to..... to hear and determine the issues of law and fact arising in this cause; and it is further ordered, adjudged and decreed that shall report his conclusions of law and fact and his judgment thereon (if desired you may add "together with the evidence upon which he founds his conclusions") to this court by the.....day of....., A. D. 19..., and the same shall be filed to wait the further action of this court.

Judge, etc.

If either party desires to make a motion for reference, the following form may be used:

Title as in bill.

And now comes A. B., plaintiff in the above cause, and moves the court that the issues in this cause setting up conflicting accounts as between E. F. and C. D. (or so much of the bill as sets up a claim for damages or whatever else it may be desired to refer) be referred to Richard Roe, Esq., the standing master of this Honorable Court (or to appoint a special master, etc.), who shall be required to inquire into and investigate the same and that he report to this court by the.....day of....., A.

D. 19..., what, if anything, be due by reason of the claim, etc., and that said report be filed subject to the further order of this court.

That said application is based upon the following grounds to wit: (Here state the exceptional condition as required by rule 59, upon which your application is made.) Wherefore the plaintiff (or defendant) prays the Court to grant this application.

R. F.,
Solicitor.

Notice of the motion and of time and place to be heard should be given to the opposite party or his counsel.

A master in chancery, being an officer of the court, should be, when the appointment of a special master is asked, made without suggestion of counsel, and therefore the application for a special master should not name any particular person for appointment. Any arrangement or agreement to appoint a special master and fix his compensation in advance is improper, especially when the master to be appointed is a party to the understanding. *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525. Let the court select the master and fix the compensation without suggestion, unless the court invites it.

Action to Be Taken After Reference Made.

When the motion is granted and the order thereon entered, the mover must, within 20 days after the order is granted, or such other time as the court may direct, bring the matter before the master. Equity rule 59. Upon failure to do so, the adverse party is at liberty forthwith to cause the proceedings to be had before the master at the cost of the party procuring the reference. Equity rule 59. If the court refers, or the reference be by consent, then the party on whom the burden rests to prove the issue must see that the reference is made as ordered, and the same rule applies if he fails to make the reference within the time prescribed by the order. In either event, the matter is brought before the master by delivering to him a certified copy of the order of reference, and the clerk shall deliver to him the pleadings, evidence, if any, and proceedings in the cause.

Duty of Master on Receiving Order of Reference.

As soon as the master can, after receiving the order of reference (equity rule 60), he should assign a time and place for the hearing, and give notice to the parties, or their counsel, as to the particular hour and place he will begin to take testimony, or hear the cause, or whatever may be required by the order of reference. The notice shall require their attendance, and if they do not appear, he can proceed with the investigation, or if this cannot be done, he may adjourn the examination to a future day, giving notice to the absent party or parties of such adjournment.

The master must so speed the cause as to have his report filed with the clerk within the time limited by the order, unless upon his application, or the application of one of the parties to the court, the time has been extended (equity rule 60), and must certify the cause of delay, if any.

Authority of the Master.

The master is authorized to regulate the proceedings before him. (*Hoe v. Scott*, 87 Fed. 220; equity rule 62.) He has full authority and power to swear and examine witnesses, or have them examined in his presence touching all matters referred to him. He may require all books, vouchers, and papers of every character relevant to the issues produced before him. He may order the examination by interrogatories, under a commission to be issued by the clerk of the court, under his certificate, or in any other manner authorized by the acts of Congress, or rules of equity, and he may do what is necessary to reach the truth and justice of the particular matter referred to him. Equity rule 62; *Goss Printing Press Co. v. Scott*, 119 Fed. 941. By equity rule 65 he has authority to examine any creditor or other person filing a claim, either *viva voce* or upon interrogatories, or in both modes, as the nature of the case may demand. *Terry v. Bank of Cape Fear*, 20 Fed. 781, 782; *Cushman & D. Mfg. Co. v. Grammes*, 225 Fed. 884.

Beyond Territorial Jurisdiction.

The master can take testimony outside of the territorial jurisdiction of the court appointing him, and also in foreign coun-

tries (*Consolidated Fastener Co. v. Columbus Button & Fastener Co.* 85 Fed. 54; *Gulf & B. Valley R. Co. v. Winder*, 26 Tex. Civ. App. 263, 63 S. W. 1046), either in person or under a commission, as before stated (*United States v. Standard Sanitary Mfg. Co.* 187 Fed. 234, and cases cited; *Bate Refrigerating Co. v. Gillette*, 28 Fed. 673; *Encyclopædia Britannica Co. v. Werner Co.* 138 Fed. 462; *Western Div. of Western N. C. R. Co. v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434).

Procedure Before the Master.

The hearing is conducted in the order of trials in court. The evidence shall be taken down by the master, or by some other person by his order and in his presence, who has been duly sworn by the master for the particular service.

Taking Evidence.

Unless the master is acting as examiner only, the admission and rejection of evidence rests in his sound discretion (*Wooster v. Gumbirner*, 20 Fed. 167; equity rule 62); but the objections to any proceeding had, or to any evidence admitted or rejected, must be duly noted by the master (*Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 704; *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.* 173 Fed. 797; *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521), with the grounds of objection, if it is desired to take advantage of the ruling by exceptions to the master's report, as will be hereinafter explained. In taking testimony the court will not entertain a motion to instruct or control the master in the admission of testimony during the investigation, or before the report is made. *Lull v. Clark*, 22 Blatchf. 207, 20 Fed. 454; *Bate Refrigerating Co. v. Gillette*, 28 Fed. 673; *DeRoux v. Girard*, 90 Fed. 537; *Hoe v. Scott*, 87 Fed. 220.

By equity rule 64 all affidavits, depositions, and documents which have been previously filed, read, or used in the cause may be used before him. By equity rule 63, in matters of accounting, creditors must bring in their respective accounts in the form of debits and credits, and anyone interested may ex-

amine the accounting party *viva voce* in reference to the same, or upon interrogatories, as the master may direct. Pulliam v. Pulliam, 10 Fed. 24-31. The master has great discretion in adjourning for the convenience of parties and witnesses, but he may refuse to adjourn to obtain additional evidence after ample time has been given and long delays occasioned. Third Nat. Bank v. National Bank, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 852.

Report of the Master.

As soon as the evidence is concluded, the Master should prepare his report *in direct response* to the order of reference, whether the reference is to report back the evidence, or the master's conclusions of fact. Equity rule 61 provides that the master shall recite in his report no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before him, but they should be identified, specified, and referred to, so as to inform the court as to the basis of his report, and if there is substantial evidence to sustain his findings or statement of the facts. Huttig Sash & Door Co. v. Fuelle, 143 Fed. 367. In Weiss v. Haight & F. Co. 148 Fed. 399, it is said that it is not necessary for the master to report all the evidence taken, unless required by the order of reference. In Dartmouth College v. International Paper Co. 132 Fed. 91 (law case), a motion was made to require the master to send up the testimony taken and depositions, and the court held that while it was in its discretion to do so, yet it would not be ordinarily exercised after the report has been filed. In this case the reference was to ascertain the amount of damages to be recovered.

When referred to hear and determine all issues, it is not necessary to report his finding on all issues; a report of the result is sufficient. Hecker v. Fowler, 2 Wall. 132, 17 L. ed. 761.

As soon as the report is prepared the master is required by equity rule 66 to return the same to the clerk's office which return shall be entered in the equity docket. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. 91 Fed. 822. The parties have no vested right in it, as the report is only

advisory, and it may, in the discretion of the court, be permitted to withdraw it for amendment or re-reference. *Ibid.* 824. *Bliss v. Anaconda Copper Min. Co.* 167 Fed. 342-347. Of course the report must be returned within the time required by the order, unless, upon application and for cause shown, further time has been allowed.

Exceptions to the Report.

By equity rule 66 the parties have twenty days from the filing of the master's report within which to except, and if no exceptions are filed the report stands confirmed. *Decker v. Smith*, 225 Fed. 776; *Re Pierce*, 210 Fed. 389.

When to be Heard.

If exceptions are filed, they shall stand for hearing before the court if in session, or if not at the next sitting held thereafter; by adjournment or otherwise. The court will not hear exceptions filed after the time given, unless occasioned by fraud, accident, or mistake. *Gasquet v. Crescent City Brewing Co.* 49 Fed. 494; *Ex parte Jordan*, 94 U. S. 252, 24 L. ed. 125, and the exceptions must be to the final report filed and not to the draft of the report by the master. *Decker v. Smith*, 225 Fed. 777.

Form of Exceptions.

Title as in bill.

And now comes A.D., plaintiff (or defendant), and excepts to the report of....., Esq., the standing (or special) master, filed in this cause on the.....day of....., A. D. 19..., and for cause of exception shows:

First. That the master has in said report stated and certified that, etc. (state it), whereas the master ought to have found that, etc.

Second. That the master, in the trial of the cause, permitted, over exceptions taken at the time as shown by the record, one E. F. to testify that, etc., when in fact the evidence was not admissible because (state objections).

Third. That the master refused to allow H. R. to testify on objection of (plaintiff or defendant), who, if he had been permitted to testify, would have sworn, etc., all of which was duly excepted to at the time as appears of record.

And so on, stating each ground of exception.

R. F.,
Solicitor, etc.

COST OF EXCEPTIONS.

By equity rule 67, in order to prevent frivolous exceptions, or for mere delay, the party whose exceptions are overruled shall, for every exception so overruled, pay \$5 costs to the other party, and for every exception sustained he shall be allowed the same amount.

CHAPTER LXXXIX.

EXCEPTIONS TO MASTER'S REPORT (continued.)

Exceptions are special demurrers to the report (General Fire Extinguisher Co. v. Lamar, 72 C. C. A. 501, 141 Fed. 353-355, and cases cited), and must point out, article by article, the matter objected to and cause of objection. They should be precise and raise well-defined issues. Ibid.; Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 290, 38 L. ed. 165, 14 Sup. Ct. Rep. 343; Fordyce v. Omaha, K. C. & E. R. Co. 145 Fed. 544-557; Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 219. Vagueness and generality are good grounds for overruling them. Ibid.; Re Covington, 110 Fed. 143; Neal v. Briggs, 110 Fed. 477.

As before stated, cases are referred to a master to economize time, and if general exceptions are permitted, the court would have to review the whole case, and the effect of the reference thus be lost. Neal v. Briggs, 110 Fed. 478; Sheffield & B. Coal, Iron & R. Co. v. Gordon, 151 U. S. 286, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; Jones v. Lamar, 39 Fed. 585; Chandler v. Pomeroy, 87 Fed. 267; Medsker v. Bonebrake, 108 U. S. 71, 72, 27 L. ed. 655, 656, 2 Sup. Ct. Rep. 351. Equity rule 67, to prevent frivolous exceptions for mere delay, provides for a party excepting to pay the costs when exceptions overruled, and *vice versa*.

Again, when exceptions are based on irrelevancy and incompetency, or objections to evidence or witness, they must show that the objections were taken before the master and preserved in the record, as well as the specific grounds of the objection. Equity rule 62; Fischer v. Neil, 6 Fed. 90; Lull v. Clark, 22 Blatchf. 207, 20 Fed. 454; Hamilton v. Southern Nevada Gold & S. Min. Co. 13 Sawy. 113, 33 Fed. 567, 568, 15 Mor. Min. Rep. 314; Bliss v. Anaconda Copper Min. Co. 156 Fed. 311, reviewing cases. Evanston v. Gunn, 99 U. S. 665, 25 L. ed.

307; *Burton v. Driggs*, 20 Wall. 133, 22 L. ed. 301; *Wooster v. Gumbirner*, 20 Fed. 167; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476; *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 67; See *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512. Exceptions must be supported by the statement of the master, or by the evidence, to which attention must be called (*Jaffrey v. Brown*, 29 Fed. 477; *Cutting v. Florida R. & Nav. Co.* 43 Fed. 743; *Farrar v. Bernheim*, 20 C. C. A. 496, 41 U. S. App. 172, 74 Fed. 438; s. c. 21 C. C. A. 264, 75 Fed. 136; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285-293, 38 L. ed. 164-166, 14 Sup. Ct. Rep. 343; *McCourt v. Singers-Bigger*, 145 Fed. 112); and the particular error, or erroneous principle upon which the master acted must be pointed out. *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *Mason v. Crosby*, 3 Woodb. & M. 258, Fed. Cas. No. 9,236. A new defense cannot be set up by exceptions. If, however, the master fails to report all evidence upon the matter to which a proper exception has been taken, the party should apply to the court for a further report. *Story v. Livingston*, 13 Pet. 367, 10 L. ed. 204.

Effect of Withdrawal of Exceptions.

The withdrawal of exceptions leaves the report confirmed (equity rule 66), for, in the absence of exceptions, there can be no inquiry into the correctness of the facts found; only misapprehension of the legal consequences are open for correction. *St. Louis Union Trust Co. v. Texas Southern R. Co.* — *Tex. Civ. App.* —, 126 S. W. 308; *Burke v. Davis*, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 907; *Re Carver*, 113 Fed. 138; *Gasquet v. Crescent City Brewing Co.* 49 Fed. 493; *Green v. Bogue*, 158 U. S. 504, 39 L. ed. 1070, 15 Sup. Ct. Rep. 975; *Hamm v. J. Stone & Sons Live Stock Co.* 18 *Tex. Civ. App.* 241, 45 S. W. 330. As to waiver of, see *Waterman v. Banks*, 144 U. S. 407, 36 L. ed. 484, 12 Sup. Ct. Rep. 646.

Waiving Exceptions Not Taken Before Master.

The question arises, what exceptions are waived if not taken before the master before filing his report. We have seen that

equity rule 66 gives twenty days within which to file exceptions to the master's report; but can under this rule any character of exception be filed that was not taken during the trial before the master? In *Story v. Livingston*, 13 Pet. 366, 10 L. ed. 203, the court held that all exceptions should be taken before the master in order to save time and give him an opportunity to correct his errors and reconsider his opinion, and a failure to do so prevents a party from excepting after the report is filed, unless the court should refer it back to take exceptions.

This decision was made in 1839, when the Federal courts adhered to the English practice in this respect. *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *American Nicholson Pav. Co. v. Elizabeth*, 1 Bann. & Ard. 439, Fed. Cas. No. 309; *Gass v. Stinson*, 2 Sumn. 605, Fed. Cas. No. 5,261. The practice of England required the master to make a draft of his report and notify counsel, so as to give an opportunity to point out errors. 2 Dan. Ch. Pr. 1314. This procedure was called settling the master's report, but there is no such practice now, because equity rule 83, promulgated in 1842, now new rule 66, provides what the master must do with reference to his report, which is to file it as soon as it is prepared, and the parties have one month to except to it from the date of filing. This is a cheaper and more expeditious mode than the old practice of settling the report, and is evidently intended by the Supreme Court as a substitute for it. *Hatch v. Indianapolis & S. R. Co.* 11 Biss. 138, 9 Fed. 856; *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 374, 375.

In *Hatch v. Indianapolis & S. R. Co.* supra, the court distinctly recognizes that there is no such practice as settling the report before filing, and that a party has thirty days to file such exceptions as he may deem necessary. *Jennings v. Dolan*, 29 Fed. 861.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476, the master had drafted his report after the English method, and the court would not hear exceptions not taken before the master; overruling *Hatch v. Indianapolis & S. R. Co.* 9 Fed. 856, and *Jennings v. Dolan*, 29 Fed. 861, above cited. *McNamara v. Home Land & Cattle Co.* 105 Fed. 202; *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512; *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 798.

In *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 374, the court held that exceptions to the master's report could be taken within thirty days after filing the report, whether taken before the master or not, and the practice followed in 13 Pet. had been abrogated. In *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 798, the court followed 13 Pet., reaffirmed the old rule, and refused to hear exceptions not taken before the master. See also *Topliff v. Topliff*, 145 U. S. 173, 36 L. ed. 665, 12 Sup. Ct. Rep. 825.

In *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68, the court followed 65 Fed. 798, but stated that the rule should only extend to issues of fact, and exceptions to conclusions of law were not necessary to be taken before the master. *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 827.

In *Burke v. Davis*, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 910, the exceptions had not been filed in thirty days, but it is strongly intimated that if they had been, they would have been heard, but that the master's conclusions of law could be attacked, with or without exceptions. In *Kilgour v. National Bank*, 97 Fed. 693, the master's conclusions of fact were set aside on exceptions filed in thirty days, and they may be set aside, though the reference be by consent. *Oteri v. Scalzo*, 145 U. S. 589, 36 L. ed. 828, 12 Sup. Ct. Rep. 895; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 291, 38 L. ed. 166, 14 Sup. Ct. Rep. 343. So may exceptions be filed to conclusions of law, though not excepted to before the master. *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 822; *Central Improv. Co. v. Cambria Steel Co.* 127 C. C. A. 184, 210 Fed. 696-700.

In view of these cases, it seems that it is still an open question as to what is the proper practice. I will venture to state what should be the rule of practice, and my reasons therefor. The reasons for filing exceptions before the master was to give him an opportunity to correct any errors he may have committed during the trial. *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68. They are the same reasons that existed under the old practice, requiring a draft of the report on the law and fact, and requiring it to be brought to the attention of counsel, that they might then and there file

such exceptions as were necessary, which were to be submitted to the chancellor if overruled. But does not equity rule 83, now new rule 66, change to some extent the old practice, and consequently modify the reasons upon which the old rule was based? Equity rule 83 evidently was intended for some purpose other than to merely repeat exceptions taken before the master, and which have been already incorporated in the record, and the thirty days given for filing is evidently intended to give an opportunity to examine the report for errors. The rule does not intimate that the exceptions to be taken within the time allowed must be only such as were previously entered of record, nor that the exceptions to the conclusions of the master must be taken before filing his report, but excludes this idea by requiring the report to be filed as soon as prepared, and the exceptions to be filed after filing the report.

If the equity rule 66 has any meaning, then it is intended that there are errors which may be committed by the master, and which may be excepted to, though no exception was taken before the master. I therefore suggest the proper practice to be, that in all matters pertaining to the conduct and hearing of the case before the master, and in the admission and rejection of evidence (*Wooster v. Gumbirner*, 20 Fed. 167), that any objections thereto must be made before the master, and exceptions reserved, if overruled, and made a part of the record, otherwise the objections will not be heard by the court (*Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 567, 568, 15 Mor. Min. Rep. 314; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 245; *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512), but considered waived. No objection to these matters of detail should be heard if not made at the proper time and incorporated in the record. It is fair to counsel and the master, that they should have an opportunity to correct errors of this character, but when the exceptions go to the action of the master involving the merits of the entire case, as his conclusions of law and *fact* and his judgment thereon, they are open to attack under equity rule 66, whether the master's attention was called to the particular ground of error or not. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 372; *Jennings v. Dolan*, 29 Fed. 861; *Hatch v. Indianapolis & S. R. Co.* 11 Biss. 138, 9 Fed. 856.

There is no question, that if a master is correct in his conclusions of fact, but wrong in his conclusions of law, that the court will correct the law, whether the master had an opportunity to correct it or not. *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476; *Shipman v. Ohio Coal Exch.* 17 C. C. A. 313, 37 U. S. App. 471, 70 Fed. 654; *United States Trust Co. v. Mercantile Trust Co.* 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153; *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 827. An appellate court will correct an erroneous construction of a contract by a master, whether excepted to or not (*Ibid.*), and there is no reason why a court should not correct an erroneous conclusion of fact with the whole record before it, even though no exception to the conclusion had been filed before the master. Of course, in the light of what has been said, an objection to conclusions of fact, if based on erroneous admission, or exclusion of testimony not excepted to before the master, would not be considered (*Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512); but there is no reason why conclusions of fact, based on admitted evidence, cannot be excepted to, though no exception to the finding had been made before the master.

There is one character of reference, perhaps, where an exception to conclusions of fact may be considered waived if not taken before the master. This rule may be applied when the entire case *by consent* of parties has been referred to a master for his judgment and decision on both law and fact, for reasons that will appear in discussing the "Effect of the Master's Report." *McNamara v. Home Land & Cattle Co.* 105 Fed. 202; *Kimberly v. Arms*, 129 U. S. 524, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720. See *Elkin v. Denver Engineering Works Co.* 105 C. C. A. 1, 181 Fed. 684. But where the cause has been referred on motion of one of the parties, or by the court on his own motion, the litigant yields no right, by proper exception under equity rule 66, to have his cause finally determined by the court on the law and fact, whether excepted to before the master or not.

In *Bliss v. Anaconda Copper Min. Co.* 156 Fed. 309, reviewing many of the cases cited above, it is suggested that it is the

duty of the master to submit to counsel a draft of his report, thereby inviting suggestions as to error, if any, in the conclusions reached; and counsel in response should make at once such objections as may appear to them to be proper, before the return of the master's report; and it is within the discretion of the court to refuse to entertain any objection not made before the master. It is further suggested that counsel should agree that exceptions thus taken before the master should be considered as exceptions taken under rule 66, in order to avoid duplicating. Ibid. 313. This method is clearly not within the letter or spirit of the rule that contemplates exceptions to the merits to be filed at any time within thirty days. *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 19.

Costs in Exceptions to Master's Report.

New rule 67 same as old rule 84 except in specifying the sum of \$5 for every exception overruled, which has been added to prevent frivolous exceptions.

CHAPTER XC.

EFFECT OF THE MASTER'S REPORT.

The report of a master, whether special or general, is entirely within the power of the court to set aside, modify, or correct in any manner consistent with the justice of the case, but the power should not be exercised but for good cause shown. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* 91 Fed. 824; *Jaffery v. Brown*, 29 Fed. 477; *Stanton v. Alabama & C. R. Co.* 31 Fed. 585; *Thomson v. Wooster*, 114 U. S. 104-112, 29 L. ed. 105-108, 5 Sup. Ct. Rep. 788; *Connor v. United States*, 131 C. C. A. 68, 214 Fed. 526, 527; *Fordyce v. Omaha, K. C. & E. R. Co.* 145 Fed. 544 (see Reference by Consent).

The report on the facts has been given the effect of a verdict of a jury upon an issue sent to them by the chancellor, which in equity is only advisory. *Oil Well Co. v. Hall*, 63 C. C. A. 343, 128 Fed. 878; *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, 90 C. C. A. 585, 164 Fed. 809, 810; *Bliss v. Anaconda Copper Min. Co.* 167 Fed. 342-347; *Flippen v. Kimball*, 87 Fed. 259; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882 (see section 723). However, it is said in *Bosworth v. Hook*, 23 C. C. A. 404, 46 U. S. App. 598, 77 Fed. 686, that when the reference is on motion of one of the parties, and not by the consent of both, the master's finding has not the force of a verdict, or the report of a referee, and upon exception thereto, the court must determine by its own judgment the controversy presented. *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882; *Knoxville v. Knoxville Water Co.* 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148.

The rule is that the findings of fact by the master have all the presumptions in their favor, and should not be set aside, unless error clearly appears, and this is especially true when

submitted by consent. Crawford v. Neal, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759, and cases cited; Cimiotti Unhairing Co. v. American Fur Ref. Co. 93 C. C. A. 546, 168 Fed. 529; Lake Erie & W. R. Co. v. Fremont, 34 C. C. A. 625, 92 Fed. 731; Davis v. Schwartz, 155 U. S. 636, 39 L. ed. 291, 15 Sup. Ct. Rep. 237; Girard Life Ins. Annuity & T. Co. v. Cooper, 162 U. S. 538, 40 L. ed. 1065, 16 Sup. Ct. Rep. 879; Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363; Cimiotti Unhairing Co. v. American Fur Ref. Co. 158 Fed. 171; Murphy v. Southern R. Co. 99 Fed. 469; s. c. 53 C. C. A. 477, 115 Fed. 259; Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 219; Singleton v. Felton, 42 C. C. A. 57, 101 Fed. 527; Walters v. Western & A. R. Co. 69 Fed. 710; Emil Kiewert Co. v. Juneau, 24 C. C. A. 294, 47 U. S. App. 394, 78 Fed. 712; Central Trust Co. v. East Tennessee Land Co. 79 Fed. 19; Chandler v. Pomeroy, 87 Fed. 262. It is *prima facie* correct. Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 90 C. C. A. 585, 164 Fed. 810; Crawford v. Neal, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794; Lake Erie & W. R. Co. v. Fremont, 34 C. C. A. 625, 92 Fed. 731; Kilgour v. National Bank, 97 Fed. 693; Davis v. Schwartz, 155 U. S. 636, 39 L. ed. 291, 15 Sup. Ct. Rep. 237; Furrer v. Ferris, 145 U. S. 134, 36 L. ed. 651, 12 Sup. Ct. Rep. 821. The only question is, are the findings supported (Cudahy Packing Co. v. Sioux Nat. Bank, 21 C. C. A. 428, 40 U. S. App. 142, 75 Fed. 475; Chicago, M. & St. P. R. Co. v. Clark, 35 C. C. A. 120, 92 Fed. 983; Steel v. Lord, 35 C. C. A. 555, 93 Fed. 729; Shipman v. Straitsville Central Min. Co. 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886), and should not be overruled, unless manifestly wrong. The Elton, 31 C. C. A. 496, 42 U. S. App. 666, 83 Fed. 520; Denver & R. G. R. Co. v. Ristine, 23 C. C. A. 13, 40 U. S. App. 579, 77 Fed. 59; Crawford v. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Kunsemiller v. Hill, 29 C. C. A. 658, 57 U. S. App. 523, 86 Fed. 200; Western U. Teleg. Co. v. American Bell Teleph. Co. 105 Fed. 686; Taintor v. Franklin Nat. Bank, 107 Fed. 825; Columbus S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 180; Ferguson Contracting Co. v. Manhattan Trust Co. 55 C. C. A. 529, 118 Fed. 792; Singleton

v. Felton, 42 C. C. A. 57, 101 Fed. 526. This rule is applicable to disputed facts, but not to conclusions from undisputed facts, or the construction of a document. United States Trust Co. v. Mercantile Trust Co. 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153, and the court will not always enforce the rule as given. United States Trust Co. v. Omaha & St. L. R. Co. 63 Fed. 742; Knoxville v. Knoxville Water Co. 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148; Bosworth v. Hook, 23 C. C. A. 404, 46 U. S. App. 598, 77 Fed. 686, 687; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355. Ultimate facts should be found. Paine v. Standard Plunger Elevator Co. 186 Fed. 605.

Findings in Matters of Account.

The findings in matters of account because of the nature of the evidence will be rarely set aside or interfered with. Camden v. Stuart, 144 U. S. 118, 36 L. ed. 368, 12 Sup. Ct. Rep. 585; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Callaghan v. Myers, 128 U. S. 619, 32 L. ed. 550, 9 Sup. Ct. Rep. 177; Robinson v. Alabama & G. Mfg. Co. 89 Fed. 221. So in findings in damages, error must be obvious (Warren v. Keep, 155 U. S. 265-267, 39 L. ed. 144, 145, 15 Sup. Ct. Rep. 83); or value of stock of goods, etc. (Reading Ins. Co. v. Egelhoff, 115 Fed. 393). A reference to a master commissioner, there being no such officer, would not affect the report. Shipman v. Straitsville Central Min. Co. 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886. (See "Who to be Appointed.")

Effect When Reference by Consent.

When a cause is submitted to a master by consent to hear and determine the questions of law and fact, and report his conclusions thereon, the courts take a different view of the force and effect of the master's findings than when the submission has been made on motion of one of the parties, or by the court on its own motion. Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 90 C. C. A. 585, 164 Fed. 810; Jefferson Hotel Co. v. Brumbaugh, 94 C. C. A. 279, 168 Fed. 867-872; Third

Nat. Bank v. National Bank, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 858; Chauncey v. Dyke Bros. 55 C. C. A. 579, 119 Fed. 21, 22; Blassengame v. Boyd, 101 C. C. A. 129, 178 Fed. 1; Spring Garden Ins. Co. v. Amusement Syndicate Co. 102 C. C. A. 29, 178 Fed. 531. The leading case upon the effect of reference by consent is *Kimberly v. Arms*, 129 U. S. 513, 32 L. ed. 764, 9 Sup. Ct. Rep. 355, familiarly known as the Arms Case. This case has been followed in *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Davis v. Schwartz*, 155 U. S. 637, 39 L. ed. 293, 15 Sup. Ct. Rep. 237; *Singleton v. Felton*, 42 C. C. A. 57, 101 Fed. 526, 527; *Schwartz v. Duss*, 43 C. C. A. 323, 103 Fed. 565; *Western U. Teleg. Co. v. American Bell Teleph. Co.* 105 Fed. 686; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720; *Fidelity & C. Co. v. St. Matthews Sav. Bank*, 44 C. C. A. 225, 104 Fed. 861; *Walker v. Kinnare*, 22 C. C. A. 75, 46 U. S. App. 150, 76 Fed. 101; *Walters v. Western & A. R. Co.* 69 Fed. 710; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 32; *Elkin v. Denver Engineering Works Co.* 105 C. C. A. 1, 181 Fed. 684.

The Arms Case substantially holds that when a case has been referred by consent to a master to determine the issues of law and fact, and such reference is entered as a rule of court, it is in effect the submission of a controversy to a private tribunal, whose decisions are not subject to be set aside and disregarded by the court. The special tribunal being agreed upon, there is no reason to give to its conclusions less weight than when decided by the court. *Ibid.*; *Farrar v. Bernheim*, 20 C. C. A. 496, 41 U. S. App. 172, 74 Fed. 438; s. c. 21 C. C. A. 264, 75 Fed. 136; *Grayson v. Lynch*, 163 U. S. 473, 41 L. ed. 232, 16 Sup. Ct. Rep. 1064; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; see *Elkin v. Denver Engineering Works Co.* 181 Fed. 684. And if the conclusions are drawn from disputed facts, they are unassailable. *Davis v. Schwartz*, 155 U. S. 631-636, 39 L. ed. 289-291, 15 Sup. Ct. Rep. 237; *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *United States Trust Co. v. Mercantile Trust Co.* 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153; *Ferguson Contracting Co. v. Manhattan Trust Co.* 55 C. C. A.

529, 118 Fed. 791; Connor v. United States, 131 C. C. A. 68, 214 Fed. 527.

It is in such cases, perhaps, that the contention that exceptions to the conclusions of the master should be taken before the master, or they will be considered waived, is correct, because, having referred your case to a special tribunal by consent, the errors which you assign on an appeal from its decision must have been passed upon adversely by the special tribunal. McNamara v. Home Land & Cattle Co. 105 Fed. 202-204, and authorities; but see 111 Fed. 822.

Re-reference to a Master.

In stating exceptions to a master's report, there may be a prayer for re-reference, but this may be done by motion. National Folding Box Co. v. Dayton Paper Novelty Co. 91 Fed. 822. However, after the report is filed and exceptions taken, courts will not readily grant a re-reference, unless the report shows that further investigation is necessary to a proper decree. Empire Trust Co. v. Egypt R. Co. 182 Fed. 100-102. Mere inaccuracies of statement, or omissions made, or even vacating the report, would not be cause for a re-reference. There must be some material injury, or a finding unjust in its consequences, or want of sufficient finding, to enter a *proper* decree. McElroy v. Swope, 47 Fed. 380. Inaccuracies may usually be corrected from the record. Fischer v. Hayes, 16 Fed. 469; Witters v. Sowles, 43 Fed. 405; Jennings v. Dolan, 29 Fed. 862; Taylor v. Robertson, 27 Fed. 537; Cimiotti Unhairing Co. v. Bowsky, 113 Fed. 699; Empire Trust Co. v. Egypt R. Co. 182 Fed. 100. But if the facts be imperfectly stated, so that it is apparent that further evidence is needed, or if unsatisfactory and other evidence can be obtained, and the justice of the case demands it, a re-reference will be ordered; but in the absence of these features, the court will not, after the report has been filed, permit the case to be reopened for further evidence, especially cumulative evidence (Ibid.; Central Trust Co. v. Georgia P. R. Co. 83 Fed. 386-399); s. c. 81 Fed. 281; nor re-refer it on a point as to which neither party requested a finding. Reading Ins. Co. v. Egelhoff, 115 Fed. 393. The master may, before the case leaves his hands, reopen it for good

cause shown, to hear further evidence. *Central Trust Co. v. Richmond & D. R. Co.* 69 Fed. 762; *Central Trust Co. v. Marietta & N. G. R. Co.* 75 Fed. 41. But when there has been long delay through negligence, he should refuse. *Third Nat. Bank v. National Bank*, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 852.

A re-reference will not be allowed to file an amendment setting up new ground for damages. *Clyde v. Richmond & D. R. Co.* 59 Fed. 394. Nor to allow additional testimony to base a recovery on special views entertained by the master and concurred in by the court. *Central Trust Co. v. Georgia P. R. Co.* 83 Fed. 386. The court, however, may re-refer it, or permit the master to withdraw it for correction and amendment. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* 91 Fed. 822; *Mosher v. Joyce*, 2 C. C. A. 322, 6 U. S. App. 107, 51 Fed. 441. See "Withdrawal." But where the master is thus permitted to withdraw his report, he cannot reverse his former findings without notice to parties. It is within the spirit of equity rule 75. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* supra.

Compensation of the Master.

A master's compensation should be measured by the work done, time employed, responsibility assumed, and the magnitude of the interests involved. It should be reasonable, perhaps liberal, but never exorbitant. Equity rule 68. *Pleasants v. Southern R. Co.* 93 Fed. 93. *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525; *Middleton v. Bankers & M. Teleg. Co.* 32 Fed. 524; *Brown v. King*, 10 C. C. A. 541, 23 U. S. App. 524, 62 Fed. 529; *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 325; *Brickill v. New York*, 55 Fed. 565. He cannot retain his report as security for his compensation, but when allowed by the court he is entitled, to an attachment for the amount against the party who is ordered to pay the same, if upon notice he does not pay in time prescribed by the court. Where the rules of court fix the *per diem* compensation of the master, a stipulation by parties to the suit to pay more will not be allowed. *Re Berkeley*, 121 C. C. A. 359, 203 Fed. 7.

Costs in Equity.

All the old rules, except as to costs on exceptions to a master's report, stating a definite amount, have been abrogated, and the matter is now in the discretion of the court. The new rules referring to costs are as follows:

Rule 8, when attachment issued to enforce compliance with a decree or order of court.

Rule 17, upon setting aside a decree *pro confesso*.

Rule 20, in amending pleadings.

Rule 40, nominal parties entitled to.

Rule 50, stenographers' fees taxed as.

Rule 51, when depositions "irrelevant, immaterial, or incompetent."

Rule 57, when case continued.

Rule 58, in proving execution or genuineness of document.

Rule 59, on reference to master.

Rule 67, in exceptions to master's report.

Rule 76, imposed on offending solicitors.

By U. S. Rev. Stat. sec. 982 (Comp. Stat. 1913, sec. 1623), an attorney who increases the costs unreasonably shall be required by the court to pay the excess. *Motion Picture Patents Co. v. Steiner*, 119 C. C. A. 401, 201 Fed. 64; *Motion Picture Patents Co. v. Yankee Film Co.* 192 Fed. 134.

Rule 76, for infraction of rule as to record on appeal.

(See also the rules of various circuits as to costs.)

(See also "Costs on Dismissal of Case by the Court," end of chap. 87, p. 555.

The discretion vested in the court to grant or apportion costs does not authorize a departure from the usual practice of awarding costs to the prevailing party. *Westfeldt v. North Carolina Min. Co.* 100 C. C. A. 552, 177 Fed. 135. As to taxing a "Docket Fee" see *Western U. Teleg. Co. v. Louisville & N. R. Co.* 208 Fed. 581.

CHAPTER XCI.

DECREE.

Definition.

The decree is the judicial decision in an equity cause upon the particular issues submitted, and can go no further than the prayer of the bill and the allegations as proved. *Washington, A. & G. R. Co. v. Bradley* (Washington, A. & G. R. Co. v. Washington) 10 Wall. 303, 19 L. ed. 895; *Baldwin v. Liverpool & L. & G. Ins. Co.* 59 C. C. A. 660, 124 Fed. 206-208; *Lewis Pub. Co. v. Wyman*, 168 Fed. 760; *McKinney v. Big Horn Basin Development Co.* 93 C. C. A. 258, 167 Fed. 771.

Classified.

Decrees are either interlocutory or final. *Richmond v. Atwood*, 17 L.R.A. 615, 2 C. C. A. 596, 5 U. S. App. 151, 52 Fed. 21. The interlocutory decree is an adjudication upon some point arising during the progress of the cause, which does not wholly determine the merits, but is necessary to preserve the subject-matter, the *status quo*, or to facilitate the trial of the case on the merits. All decrees not final, as hereinafter stated, are classed as interlocutory, even though they may settle the equities of the bill, as in *Lodge v. Twell*, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 537, 36 L. ed. 1081, 13 Sup. Ct. Rep. 170; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; *Latta v. Kilbourn*, 150 U. S. 539, 37 L. ed. 1175, 14 Sup. Ct. Rep. 201; *California Nat. Bank v. Stateler*, 171 U. S. 449, 43 L. ed. 234, 19 Sup. Ct. Rep. 6; *Mercantile Trust Co. v. Chicago, P. & St. L. R. Co.* 60 C. C. A. 651, 123 Fed. 392; *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 317; *West v. East Coast Cedar Co.* 51 C. C. A.

416, 113 Fed. 743; Covington v. First Nat. Bank, 185 U. S. 277, 46 L. ed. 908, 22 Sup. Ct. Rep. 645; Southern R. Co. v. Postal Teleg. Cable Co. 179 U. S. 643, 45 L. ed. 356, 21 Sup. Ct. Rep. 249.

Final Decree.

A final decree is one that entirely disposes of the cause, so that nothing is left for the court to adjudicate (2 Dan. Ch. Pr. 974n); or a decree that disposes ultimately of the suit (Adams, Equity, page 375); or a final decree is one determining the litigation on its merits, and leaves nothing to be done, but to enforce by order or execution, what has been determined by the court. Ibid.; Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4; Blythe v. Hinckley, 84 Fed. 238; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; New Orleans v. Peake, 2 C. C. A. 626, 2 U. S. App. 403, 52 Fed. 76; Harrison v. Clarke, 90 C. C. A. 413, 164 Fed. 539; Beebe v. Russell, 19 How. 283-286, 15 L. ed. 668, 669; Odbert v. Marquet, 99 C. C. A. 60, 175 Fed. 50, 51; Wilson v. Smith, 61 C. C. A. 446, 126 Fed. 919; Scriven v. North, 67 C. C. A. 348, 134 Fed. 366; Sanders v. Bluefield Waterworks & Improv. Co. 45 C. C. A. 475, 106 Fed. 587; Easton v. Houston & T. C. R. Co. 44 Fed. 9; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Andrews v. National Foundry & Pipe Works, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 517; Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 159; Re Michigan C. R. Co. 59 C. C. A. 643, 124 Fed. 730, 731; Baxter v. Bevil Phillips & Co. 219 Fed. 309.

Whether it is final depends on its essence, and not on its form, or what it is called. Botter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Standley v. Roberts, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 840; Salmon v. Mills, 13 C. C. A. 372, 27 U. S. App. 732, 66 Fed. 33; Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 557. The controversy must be settled (Hohorst v. Hamburg American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; French v. Shoemaker, 12 Wall. 98, 20 L. ed. 271), and must leave the case in such a condition that if there be an affirmance in the appellate court,

the court below will have nothing to do but execute its judgment. *Connell v. Smiley*, 156 U. S. 339, 39 L. ed. 444, 15 Sup. Ct. Rep. 353; *Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 812, 813; *Tuttle v. Claffin*, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 8; *Dainese v. Kendall*, 119 U. S. 54, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; *Parsons v. Robinson*, 122 U. S. 115, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1153; *Chicago & O. River R. Co. v. McCammon*, 10 C. C. A. 50, 18 U. S. App. 628, 709, 61 Fed. 776.

So much for classification and definition for the present. As interlocutory and final decrees will be discussed under "Appeals" (see "Final Decree as Basis of Appeal"), I pass on to—

Framing the Decree.

A decree in equity adapts itself to the necessities of each case. *Payne v. Hook*, 7 Wall. 432, 19 L. ed. 262. Its great elasticity is the advantage over the judgment at law, but it should not go beyond the relief necessary to secure complainant in what he is entitled to under the pleadings and prayer. *Underground Electric R. Co. v. Owsley*, 169 Fed. 671; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 650; *Lockhart v. Leeds*, 195 U. S. 427-437, 49 L. ed. 263-269, 25 Sup. Ct. Rep. 76; *Gage v. J. F. Smyth Mercantile Co.* 87 C. C. A. 377, 160 Fed. 426; *Graham v. La Crosse & M. R. Co.* 3 Wall. 710-712, 18 L. ed. 251, 252. Or it may be entered on conditions, as doing equity. *Andrews v. Connolly*, 145 Fed. 43; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 81 C. C. A. 643, 152 Fed. 861; *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 588, 126 Fed. 46-50. It may provide for payment of future instalments. *Dancel v. Goodyear Shoe Machinery Co.* 137 Fed. 157-161. Or it may conform the decree to the case made. *Bracken v. Neill*, 15 Tex. 110, but see *Baldwin v. Liverpool & L. & G. Ins. Co.* 59 C. C. A. 660, 124 Fed. 208.

Who to Prepare.

The solicitor of the party obtaining the decree must prepare

it for the judge's signature. If for the plaintiff, it must be prepared in accordance with the prayer of the bill, or whatever part thereof is granted by the court. *Crocket v. Lee*, 7 Wheat, 525, 5 L. ed. 514; *Simms v. Guthrie*, 9 Cranch, 27, 3 L. ed. 644. After drawing the decree, it must be submitted to opposite counsel, and such objections as are made to the draft must be noted, and if not admitted by counsel, they must be presented to the court for settlement. If there is no objection to the decree, or after objections made have been settled by the court, it must then be presented for the judge's signature, after which it is delivered to the clerk for record in the minutes of the court.

If the judgment is for the defendant, his solicitor draws the decree dismissing the bill, but if the defendant is in by cross bill, praying affirmative relief, which is granted, then his counsel draws the decree, as required when plaintiff recovers.

Rules Referring to Drawing Decrees.

By equity rule 71 it is provided that in drawing decrees and orders, neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any master, nor any other proceeding shall be recited or stated in the decree or order; but the decree or order shall begin in substance as follows:

This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows (here insert the decree or order).

Equity rules 8, 9.

The decree should be expressed in apt terms, and set forth the exact conclusion of the court, especially as to any act to be done, or not done; and in case anything is to be done, time, mode, and conditions must be clear and plain. Equity rule 8. The decree must conform to the allegations, proof and prayer. *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513; *Simms v. Guthrie*, 9 Cranch, 19-27, 3 L. ed. 642-645.

By equity rule 73 it was provided that every decree for an account of the personal estate of a testator, or intestate, shall contain a direction to the master to whom it is referred to state

what parts, if any, are outstanding, or undisposed of, unless otherwise directed, but this rule has been omitted from the new rules.

By equity rule 10 it is provided that in foreclosure suits a decree for any balance over and above the proceeds of the sale under the mortgage may be entered with an execution for such balance, as provided in equity rule 8, where the decree is solely for money. However broad the terms of the decree, it will be read in the light of the pleading and proof. *Graham v. Chamberlain*, 3 Wall. 710-712, 18 L. ed. 251, 252; *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513. As to necessity of signing, see *Ommen v. Talcott*, 180 Fed. 927. See also *United States v. Stoller*, 180 Fed. 910.

Recording the Decree.

Counsel can rely on the clerk to correctly transcribe the decree, and his failure to do so does not affect the relief granted. (*Blythe v. Hinckley*, 84 Fed. 228); has no effect until entry (*Ommen v. Talcott*, 180 Fed. 927); must be recorded in the equity journal (Equity rule 3, cl. 3.)

Correcting Errors.

Clerical errors in decrees or errors of omission, can be corrected at any time before close of term, upon application to the court, without the expense of a rehearing. Equity rule 72; *Witters v. Sowles*, 32 Fed. 131; *Hicklin v. Marco*, 64 Fed. 609; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691; *Ommen v. Talcott*, 180 Fed. 927; *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 887. See "Rehearing" for further discussion over decrees during the term.

As distinguished from *altering* or *amending* the decree, courts may correct errors after the term, first, when the necessity and matter to make the correction appears of record; or, second, when the matter requiring correction rests in the recollection of the court, or may be proved *aliunde*. *Odell v. Reynolds*, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656-659, and cases cited;

Gilmer v. Grand Rapids, 16 Fed. 708-710; Re Wight, 134 U. S. 136-143; Bernard v. Abel, 84 C. C. A. 361, 156 Fed. 652, and cases cited; Gagnon v. United States, 193 U. S. 456, 48 L. ed. 747, 24 Sup. Ct. Rep. 510; Whiting v. Equitable Life Assur. Soc. 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 200; Lincoln Nat. Bank v. Perry, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 888, 889.

Amending Decree.

Judgments may be *amended* by the court during the term (Ibid.; Whiting v. Equitable Life Assur. Soc. 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 197; Rev. Stat. sec. 954, Comp. Stat. 1913, sec. 1591; Eq. rule 19; Bronson v. Schulten, 104 U. S. 415, 26 L. ed. 799; Mahler v. Animarium Co. 64 C. C. A. 329, 129 Fed. 897; Ex parte Lange, 18 Wall. 167, 21 L. ed. 876; Goddard v. Ordway, 101 U. S. 752, 25 L. ed. 1043; Webster v. Oliver Ditson Co. 171 Fed. 895); but not after the term, except in correcting errors apparent, as before stated (Phillips v. Negley, 117 U. S. 678, 29 L. ed. 1016, 6 Sup. Ct. Rep. 901; Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Van-Dorn v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 271; Campbell v. James, 31 Fed. 526; Morgan's L. & T. R. & S. S. Co. v. Texas, 32 Fed. 530; Doe v. Waterloo Min. Co. 60 Fed. 643; Petersburg Sav. & Ins. Co. v. Dellatorre, 17 C. C. A. 310, 30 U. S. App. 504, 70 Fed. 645; Tubman v. Baltimore & O. R. Co. 190 U. S. 39, 47 L. ed. 947, 23 Sup. Ct. Rep. 777; McGregor v. Vermont Loan & T. Co. 44 C. C. A. 146, 104 Fed. 710; Klever v. Seawall, 12 C. C. A. 653, 22 U. S. App. 458, 65 Fed. 378, 379; Mootry v. Grayson, 44 C. C. A. 83, 104 Fed. 613; Easton v. Houston & T. C. R. Co. 44 Fed. 10; Home Street R. Co. v. Lincoln, 89 C. C. A. 133, 162 Fed. 137; Virginia T. & C. Steel & I. Co. v. Harris, 80 C. C. A. 658, 151 Fed. 435; Thomson v. Dean, 7 Wall. 345, 19 L. ed. 95). It cannot be done by motion, but only by a bill in equity. Ibid.; King v. Davis, 137 Fed. 217, 218, and cases cited; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364. Except where a motion was made at the term and continued by the court over. Walker v. Moser, 54 C. C. A. 262, 117 Fed. 232; Amy v. Watertown, 130

U. S. 313, 32 L. ed. 950, 9 Sup. Ct. Rep. 530; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 53.

It has, however, been held that in decrees, as in foreclosures, which direct the manner in which the decree shall be enforced, it is in the power of the court to change or modify this feature of the decree at any term of the court, because such provision in a decree is only in effect an equitable execution, and there is no vested right in a party to have the execution of a decree performed in any particular manner. *Mootry v. Grayson*, 44 C. C. A. 83, 104 Fed. 613; *Royal Trust Co. v. Washburn, B. & I. R. Co.* 113 Fed. 536; *Graham v. Coolidge*, 30 Tex. Civ. App. 273, 70 S. W. 231; see *Earle v. McCartney*, 112 Fed. 372; *Thomson v. Dean*, 7 Wall. 346, 19 L. ed. 95.

Force of the Decree.

The decree is conclusive on all issues joined (*Russell & Co. v. Lamb*, 49 Fed. 771; *Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 322, 107 Fed. 328-332; *Black v. Caldwell*, 83 Fed. 884; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 570, 571; *Confectioners' Machinery & Mfg. Co. v. Racine Engine & Mach. Co.* 163 Fed. 915; *Russell v. Russell*, 129 Fed. 434-438; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 78 C. C. A. 33, 147 Fed. 904; *Garner v. Second Nat. Bank*, 89 Fed. 636), as well as those that should obviously have been made (*Ibid.*; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; *Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. 386; *Burton v. Huma*, 37 Fed. 738; *Chavent v. Schefer*, 59 Fed. 232; see *Russell v. Russell*, 129 Fed. 438). Or, to state it in another form, a decree is conclusive as to all facts without the admission or proof of which the decree could not have been rendered. *Kilham v. Wilson*, 50 C. C. A. 454, 112 Fed. 572; see also *Wilson v. Smith*, 117 Fed. 711; *Ætna L. Ins. Co. v. Hamilton County*, 54 C. C. A. 468, 117 Fed. 84.

While most of the cases cited refer to judgments at law, yet there is no essential difference between the effect of the decree in equity and judgment at law. *Thompson v. Roberts*, 24 How. 240, 16 L. ed. 649; *Kilham v. Wilson*, 50 C. C. A. 454, 112

Fed. 573. However, in some cases, as in *Russell v. Russell*, 129 Fed. 438, it is intimated that there is a difference. Where by the terms of a decree anything is ordered to be done, as a transfer of property, the effect of the act when done is to invest the transfer with rights of ownership, as completely as if it had been under execution, or order of sale. *Thomson v. Dean*, 7 Wall. 345, 19 L. ed. 95.

Presumed to Be Right.

A decree in equity is presumed to be right. *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 88, and cases cited; *Big Six Development Co. v. Mitchell*, 1 L.R.A.(N.S.) 332, 70 C. C. A. 569, 138 Fed. 280.

Acting on the Person.

It is an ancient maxim that "equity acts upon the person." It was only the expression of the fact that anciently the chancellor could not bind the right, but only coerce the person. But this bearded maxim has been shorn of much of its force, for now equity binds the right, and coercion of the party has but limited application in modern practice. The most forcible illustrations of its application are found in injunctions, and where the parties are within the jurisdiction of the court, but the property to be affected by the decree is beyond the jurisdiction of the court.

It will be seen under "Enforcement of Decrees" that the Federal courts, through the equity rules, still retain the right to coerce the person, where an act is to be done to render the decree effective, in many of the States; however, decrees establishing an estate, interest, or right of property, divesting out of one party and vesting in another, are by statute made sufficient muniments of title, independent of any action of the parties to the decree, and such decrees may be recorded as title. *Tex. Rev. Stat.* 3625, 4649, 5275. See new equity rule 8.

Extraterritorial Effect.

A decree cannot act extraterritorially, that is, it cannot affect

lands in other States. *Carpenter v. Strange*, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. Rep. 960; *Remer v. McKay*, 54 Fed. 434; *Dull v. Blackman*, 169 U. S. 247, 42 L. ed. 734, 18 Sup. Ct. Rep. 333. Yet where the court has jurisdiction of the person, it can bind the conscience of the party in regard to land, and compel him to do equity. It may decree a conveyance by him of land in another State and may enforce the decree by process against the defendant. *Miller v. Rickey*, 127 Fed. 580; *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473; *Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 542, 61 U. S. App. 636, 90 Fed. 146; *Gage v. Riverside Trust Co.* 86 Fed. 998. Or remove cloud from title. *Remer v. McKay*, 54 Fed. 432; *Hart v. Sansom*, 110 U. S. 154, 28 L. ed. 103, 3 Sup. Ct. Rep. 586; *Municipal Invest. Co. v. Gardiner*, 62 Fed. 956. It may enjoin a resident suit in another State. *Cole v. Cunningham*, 133 U. S. 116, 33 L. ed. 543, 10 Sup. Ct. Rep. 269; *Gage v. Riverside Trust Co.* 86 Fed. 999.

Lien of a Decree.

By act of 1888, 25 Stat. at L. 357, chap. 729, Comp. Stat. 1913, sec. 1606, the decree of a Federal court has the same lien on property in the State where rendered as are given to the judgment and decrees of the courts of the State having general jurisdiction; and whatever is necessary to be done by State statutes to fix and retain the liens of judgments and decrees must be done in the same manner to fix the lien of the Federal decree, provided the State statute authorizes the Federal decrees to be so registered and recorded; or to do whatever is required by the State laws with reference to its own judgments and decrees. *Batts' Rev. Stat. (Tex.) Arts. 3283-3293.*

In 1895 this act was amended (28 Stat. at L. 813, 814, chap. 180), so that it was not necessary to record or register the judgment or decree in the county in which the Federal court was held, in order to fix the lien, if by law the clerk of the United States court be required to have a permanent office there, and a judgment record open at all times for inspection. By U. S. Rev. Stat. sec. 967, U. S. Comp. Stat. 1913, sec. 1608, decrees of Federal courts cease to be liens in like manner as decrees in State courts.

Enforcement of the Decree.

Remedies in enforcing judgments at law (U. S. Rev. Stat. sec. 916; Comp. Stat. 1913, sec. 1540), do not apply in equity (Hudson v. Wood, 119 Fed. 764). Decrees are controlled by rules of court, and terms of the decree. General Electric Co. v. Hurd, 171 Fed. 984; see Cumberland Lumber Co. v. Tunis Lumber Co. 96 C. C. A. 244, 171 Fed. 352. As to sale of lands in the Federal courts see 27 Stat. at L. 751, chap. 225, (Comp. Stat. 1913, sec. 1640); Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 881; Godchaux v. Morris, 57 C. C. A. 434, 121 Fed. 482; and Files v. Brown, 59 C. C. A. 403, 124 Fed. 133. By equity rule 8 final process to execute any decree may, if the decree be solely for money, be by a writ of execution, as at common law. If for the performance of any specific act, as executing a conveyance of land, or delivering up deeds or other documents, where the time in which the act to be done, which must be stated in the decree has lapsed, and not complied with, then upon affidavit of the plaintiff of the fact, filed with the clerk, he shall be entitled to a writ of attachment against the delinquent party, who, when his person has been attached, shall not be discharged unless upon a full compliance, with the payment of all costs. The court, however, may extend the time of performance, and thus release him. If the delinquent party cannot be found, a writ of sequestration may issue against his estate, upon a return of *non est inventus*, to compel obedience. Equity rule 7; equity rule 8. When the decree requires delivery of possession, which is refused, then upon affidavit of a demand and refusal to obey the decree or order, the party is entitled to a writ of assistance from the clerk of the court. Equity rule 9; equity rule 8, as to interlocutory orders. Alton Water Co. v. Brown, 92 C. C. A. 598, 166 Fed. 840-843; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; Collin County Nat. Bank v. Hughes, 83 C. C. A. 661, 155 Fed. 390; Terrell v. Allison, 21 Wall. 291, 22 L. ed. 635; Root v. Woolworth, 150 U. S. 410, 37 L. ed. 1125, 14 Sup. Ct. Rep. 136.

By equity rule 11 it is provided that every person not being a party in any cause, who has obtained an order, or in whose favor an order shall be made, shall be enabled to enforce obedience by the same process as if he were a party. And every per-

son not being a party to the cause against whom obedience to an order of the court may be enforced shall be liable to the same process for enforcing obedience as if he were a party.

The same rules apply to the enforcement of interlocutory orders and decrees, and the same practice to enforce them. Equity rule 8. You must file in the clerk's office an affidavit, showing the noncompliance of the defendant with the order. The affidavit must show the order, the time within which it was to be obeyed, the default of the defendant, and a prayer for the attachment or whatever process is asked. The clerk is authorized to issue an attachment directed to the United States marshal, commanding him to attach the defendant, if found in the district, and to bring him forthwith (or some appointed day), before the judge of the district court of the United States for the . . . district of . . . , in the city of . . . in said district, to answer for contempt in not obeying the decree of the court by which he was directed and required to (State part of the decree that required the act to be done), and you are hereby commanded to detain him in custody until he is discharged by the court.

Witness the Hon. . . , Chief Justice of the United States, etc.

Attest:

X. Y.,
Clerk, etc.

See *Pease v. Rathbun-Jones Co.* — C. C. A. —, 228 Fed. 275; *Richards v. Harrison*, 218 Fed. 134.

The writ of sequestration authorized to be issued against the estate of a person to compel obedience to the decree follows the failure to attach the person because not found. The plaintiff should file a petition reciting the order that has been disobeyed, the issuance of the attachment, the return not found, and then set forth that the defendant has property within the jurisdiction, and ask the court for an order of sequestration.

Judge Shiras says in the second edition of his *Equity Practice*, page 141, that the writ is directed to the sequestrators, that is, the parties selected to take charge of the property. The writ should command them to take possession of the estate of the delinquent defendant, and to hold the same, with its proceeds, rents, and profits for the order of the court, who may

ultimately apply it to the satisfaction of the decree, though the primary purpose of the seizure was to coerce the defendant. Although the process is still retained in the rules, there is no reported case that I know of illustrating its use. Equity rule 8.

Delivery of Possession.

If the decree be for possession of property, an affidavit that a party refuses possession authorizes the clerk to issue a writ of assistance, directed to the United States marshal, commanding him to put the plaintiff in possession. The writ is a familiar one, and will be issued by the clerk upon application based upon affidavit, as stated. Equity rule 9. (See authorities above.)

Execution of Decree in Foreclosure.

In matters of foreclosure, as before stated (equity rule 10), when a decree is rendered for a balance that may be found due over and above the proceeds of sale of the mortgaged property, execution may issue as at common law (equity rule 8; U. S. Rev. Stat. sec. 985, Comp. Stat. 1913, sec. 1631); *Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 187, 188; *Northwestern Mut. L. Ins. Co. v. Keith*, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374); and when the decree is for the payment of money, you may use any statutory method provided by a State for collecting. *Sage v. St. Paul, S. & T. F. R. Co.* 47 Fed. 3.

As to decrees of foreclosure and orders of sale, the forms that are familiar to you in State practice may be used. In enforcing a decree a court cannot require as a precedent condition the payment of money found by a master to be due the defendant, where the facts upon which such finding is based were not pleaded. *Burke v. Davis*, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 907. Again, in enforcing a decree, a court retains jurisdiction, even after the term, to make further orders directing the manner of its execution; and to that extent it may modify the provisions of the original decree, as by changing the times or terms of a sale of property. *Mootry v. Grayson*, 44 C. C. A. 83, 104 Fed. 613; *Bound v. South Carolina R. Co.* 55 Fed. 186; *Alton Water Co. v. Brown*, 92 C. C. A. 598, 166

Fed. 840; *Graham v. Coolidge*, 30 Tex. Civ. App. 273, 70 S. W. 231; *Sinsheimer v. Simonson*, 47 C. C. A. 51, 107 Fed. 905; *Re Sanborn*, 52 Fed. 586.

So much for the statutes and equity rules controlling the enforcement of decrees. There is no question that a circuit court has full powers, coextensive with its jurisdiction to make decrees, to enforce them by proper process, or ancillary suits, if necessary; but in the matter of issuing attachments for the person of the defendant, either by mesne or final process, it is proper here to call your attention to sections 990 and 991 of the United States Revised Statutes (Comp. Stat. 1913, secs. 1636, 1637), providing that no person can be arrested and imprisoned for debt on any process issuing out of the United States courts, in a State that forbids imprisonment for debt. *Re Purvine*, 37 C. C. A. 446, 96 Fed. 195. Consequently, the rules which make this provision in mesne or final process cannot be enforced in such a State, when the sole purpose of the suit is for the recovery of money, as in accounting, or for money due on any judgment or decree founded upon contract. *Nelson v. Hill*, 89 Fed. 477; *Mallory Mfg. Co. v. Fox*, 20 Fed. 409; *Low v. Durfee*, 5 Fed. 256. The first clause of equity rule 8 provides the only method by which money can be collected under a decree in equity.

By the last clause of new rule 8, if mandatory orders, injunctions, and decrees for specific performance be not complied with, the court or judge, instead of proceedings for contempt may direct the act to be done by some other person appointed by him, at the cost of the disobedient party.

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CHAPTER XCII.

SALES UNDER DECREE.

You must note the special provisions of the Federal statute, act of 1893, 27 Stat. at L. 751, chap. 225 (Comp. Stat. 1913, sec. 1640), and not pursue the State methods. *Cumberland Lumber Co. v. Tunis Lumber Co.* 96 C. C. A. 244, 171 Fed. 352. By the act above cited, it is provided that all real estate or any interest in land ordered to be sold by a decree of any United States court, must be sold at the court house of the county in which the property, or a greater part thereof, is located, or upon the premises, as the court may decree. That personal property must be sold in the same way, unless otherwise ordered. (See authorities under "Execution of Decree," also under "Enforcement of Decree.")

By section third of the act it is provided that the sale of real estate must be published at least once a week for four weeks in a newspaper published and circulating in the county where the land is situated. If the real estate is in more than one county, then notice must be published in such of the counties as the court may direct. The real estate must be described in the notice. This statute, it is declared, is for the benefit of the defendant in execution, and creates a personal privilege or right which he may insist on or waive. *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 391-393.

Sale by Master.

Whether the sale be made by the United States marshal, or the master in chancery, or a special master commissioner, the same rules must be pursued, unless otherwise directed by the decree. It must be made subject to the provisions of the act above given, and in such manner as the court may direct within the provisions of the act of 1893.

The authority upon which this ministerial duty is performed, whether by marshal or master, is the decree, a copy of which the clerk must furnish him. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 497. The decree must be strictly followed, and when the sale is made, a prompt return must be made by the officer. As to form of return of sale, see *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 392, 393; *Byrne v. Jones*, 90 C. C. A. 101, 159 Fed. 321; *Clark v. Iowa Fruit Co.* 185 Fed. 604.

Motion to Confirm.

On filing the report of sale, counsel for plaintiff should make a motion to confirm the sale, but the court usually gives a reasonable time within which to file exceptions to the sale. The act being purely ministerial, no right can be claimed under equity rule 66, providing for exceptions to master's reports. *Pewabic Min. Co. v. Mason*, 145 U. S. 363, 36 L. ed. 736, 12 Sup. Ct. Rep. 887. If no exceptions are filed, the sale may on motion be confirmed, or the court may of its own motion set the sale aside. See *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 843, 844-850, for decree confirming sale. As to the practice, see *Coltrane v. Baltimore Bldg. & L. Asso.* 126 Fed. 839, 840. Anyone interested in having the sale confirmed, whether purchaser, creditor, or receiver, may make the motion. *Ibid.*

Exceptions to Sale.

Any objections to the officer appointed to sell must be made by direct attack on the order appointing him. A standing master appointed to sell need not take an oath nor file a bond. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 497. Exceptions to the sale or the price, or the failure of the officer to perform a required duty, must be made specifically, and supported by affidavit, if the objection raised is not apparent in the record.

If the exceptions are sustained, a resale is ordered; if not sustained, or no exceptions are filed within the time allowed by the court, the sale will be confirmed, and the court will order

the officer selling to execute and deliver a conveyance to the purchaser. If any delay is occasioned in executing the deed, as where under the laws of a State a party has a right to redeem within a certain period after sale, then a certificate of the sale should be delivered to the purchaser until the period for redemption has expired. If the property has not been redeemed, a report should be made to the court, with a proper deed executed for the court's approval, and then delivered to the purchaser if approved. However, this may not be necessary where the court has anticipated the period of redemption in his approval of the sale, and ordered the master to execute and deliver the deed after the period of redemption expires without having been redeemed. Of course, if the property is redeemed, a report must be made at once for the further action of the court.

Effect of Bid.

The sale, report, and confirmation are all necessary to transfer the property; a bid at the sale accepted by the master is dependent upon confirmation before it in reality becomes an accepted bid. The bid, then, is but an offer to take the property, the acceptance of which is evidenced by the confirmation by the court. *Tennessee v. Quintard*, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 835 and cases cited; *Camden v. Mayhew*, 129 U. S. 73, 32 L. ed. 608, 9 Sup. Ct. Rep. 246; *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43. When purchaser fails to complete bid he is entitled to notice of resale. *Bayne v. Brewer Pottery Co.* 90 Fed. 623; *Stuart v. Gay*, 127 U. S. 526, 32 L. ed. 193, 8 Sup. Ct. Rep. 1279; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Mayhew v. West Virginia Oil & Oil Land Co.* 24 Fed. 205.

Purchaser Under.

A purchaser under a judicial sale becomes a quasi party to the suit from which the process issued, and he must take notice of all the subsequent proceedings in the cause, if any. *Tennessee v. Quintard*, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 835; *Davis v. Mercantile Trust Co.* 152 U. S. 594, 38

L. ed. 565, 14 Sup. Ct. Rep. 693; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Stuart v. Gay*, 127 U. S. 518, 32 L. ed. 191, 8 Sup. Ct. Rep. 1279. See *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706.

Notice of Proceedings After Decree.

After final decree, parties to the suit are not bound to take notice of subsequent proceedings, unless served with process, or they voluntarily appear (*Smith v. Woolfolk*, 115 U. S. 147, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 336, 40 L. ed. 990, 16 Sup. Ct. Rep. 810; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 793); especially when new and distinct issues from the original bill are set up. *Smith v. Woolfolk*, 115 U. S. 148, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177.

CHAPTER XCIII.

REHEARING.

A court of equity has full power over its decrees *during the term* in which they are entered, and may vacate, modify, supplement, or supersede, as we have before seen in chapter 95 (Doss v. Tyack, 14 How. 312, 313, 14 L. ed. 435; Henderson v. Carbondale Coal & Coke Co. 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691; Bronson v. Schulten, 104 U. S. 415, 26 L. ed. 799; Goddard v. Ordway [Phillips v. Ordway] 101 U. S. 752, 25 L. ed. 1043); or grant a rehearing, which is addressed to the sound discretion of the court, and cannot be reviewed or assigned as error (McLeod v. New Albany, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379, 382; Iron R. Co. v. Toledo, D. & B. R. Co. 10 C. C. A. 319, 18 U. S. App. 479, 62 Fed. 169, and cases cited). After decree, and before term closes, you may apply for a rehearing by petition, or you may directly appeal, as will be hereafter shown. Equity rule 69; First Nat. Bank v. Woodrum, 86 Fed. 1004; Giant Powder Co. v. California Vigorit Powder Co. 6 Sawy. 527, 5 Fed. 197; Harman v. Lewis, 24 Fed. 530. (See "Rehearing in Appeals.")

A rehearing in equity is in effect nothing more than an application for a new trial at law, based on similar grounds and subject to the same limitations in considering evidence and errors of law and fact. Giant Powder Co. v. California Vigorit Powder Co. 6 Sawy. 527, 5 Fed. 201. The difference, however, is this: in equity the application for a rehearing is not an *ex parte* proceeding. Ibid.; Harman v. Lewis, 24 Fed. 530.

The party complaining must file a petition embodying the requisites of equity rule 69. Easton v. Houston & T. C. R. Co. 44 Fed. 9. It must contain the special matter upon which the rehearing is applied for, it shall be signed by counsel, and the facts stated must be sworn to unless apparent in the rec-

ord. McLeod v. New Albany, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379; Allis v. Stowell, 85 Fed. 481.

Time of Filing.

The rule further provides for the time of filing the petition, or within which it may be filed, as follows: If the case is appealable, it must be filed by the end of the term in which the case is tried; if not appealable, the petition may be filed before the end of the next term of the court. Equity rule 69; First Nat. Bank v. Woodrum, 86 Fed. 1004; Easton v. Houston T. C. R. Co. 44 Fed. 9; Moelle v. Sherwood, 148 U. S. 25, 37 L. ed. 352, 13 Sup. Ct. Rep. 426; Newman v. Moody, 19 Fed. 858. This latter clause of the rule is not now applicable, as all the cases decided in the circuit court are appealable to the circuit court of appeals. So that now there is no exception to the rule that a petition for rehearing must be filed before the end of the term in which the decree is entered. Halsted v. Forest Hill Co. 48 C. C. A. 681, 109 Fed. 820; Omaha Electric Light & P. Co. v. Omaha, 133 C. C. A. 52, 216 Fed. 854.

Order to Show Cause.

As said, the application is not *ex parte*, but the applicant should procure an order from the court requiring the adverse party to show cause at some future day why the prayer of the petition should not be granted. The adverse party may then answer the petition, and on petition and answer the application is heard. Harman v. Lewis, 24 Fed. 531.

Grounds of Application.

Unless you have some new and forcible ground, such as where a mistake is palpable, or some material fact has been overlooked by the court, it is better to appeal at once. Martin-dale v. Waas, 3 McCrary, 637, 11 Fed. 551. It is not profitable to catch at straws, or rehash old arguments, as the result of a vast majority of these applications attest; besides, the action of the court on rehearing is not reviewable on appeal. Iron R. Co. v. Toledo, D. & B. R. Co. 10 C. C. A. 319, 18 U. S. App.

479, 62 Fed. 169; McLeod v. New Albany, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379; Rogers v. Riessner, 34 Fed. 270. If fraud alleged, state the facts; general allegations not good. Hicks v. Otto, 85 Fed. 728.

Newly Discovered Evidence.

Newly discovered evidence is a ground upon which to base a rehearing in equity, but in such cases the petition must contain, independently of the affidavits setting up the newly discovered evidence, the nature of the evidence; that it is material, showing in what way; the fact that it was not known until after the decree; the time and circumstances under which it came to the knowledge of the party setting it up; and that it could not have been discovered sooner by reasonable diligence. Acme Flexible Clasp Co. v. Cary Mfg. Co. 99 Fed. 500; Hostetter Co. v. Comerford, 99 Fed. 834; Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. 64 Fed. 125; McLeod v. New Albany, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379; Hicks v. Otto, 85 Fed. 728; Allis v. Stowell, 85 Fed. 481; Central Trust Co. v. Worcester Cycle Mfg. Co. 91 Fed. 212; Anderson Land & Stock Co. v. McConnell, 171 Fed. 475; Tilghman v. Werk, 39 Fed. 680; Witters v. Sowles, 31 Fed. 5; Vermont Farm Mach. Co. v. Converse, 10 Fed. 825; Rintoul v. New York C. & H. R. R. Co. 20 Fed. 313; Colgate v. Western U. Teleg. Co. 22 Blatchf. 118, 19 Fed. 828; Sheeler v. Alexander, 211 Fed. 544, 545; equity rule 69; American Hoist & Derrick Co. v. Nancy Hanks Hay Press & Foundry Co. 224 Fed. 524.

Must Be Material.

It must be material, and not cumulative (Rogers v. Marshall, 13 Fed. 59), and reasonably sufficient to change the result (Torrent v. Duluth Lumber Co. 32 Fed. 229; Allen v. New York, 18 Blatchf. 239, 7 Fed. 483; Munson v. New York, 20 Blatchf. 358, 11 Fed. 72; Pfanschmidt v. Kelly Mercantile Co. 32 Fed. 667; Witters v. Sowles, 32 Fed. 765), and not mistaken view of counsel (Witters v. Sowles, 31 Fed. 5).

On Error in Law.

If the complaint is that the court has committed an error in law, it must be shown that the particular point was not presented in argument.

On Ground Defendant Not Represented.

If on ground that defendant was not present, or represented by counsel on the hearing, you must show excuse, and that you have a meritorious defense. *Blair v. Silver Peak Mines*, 93 Fed. 332; *Tilghman v. Werk*, 39 Fed. 680. See *Jordan v. Brown*, — Tex. Civ. App. —, 94 S. W. 398; *Witters v. Sowles*, 31 Fed. 5.

Effect of Granting.

If rehearing is granted to admit additional proof, the decree should stand pending the rehearing. *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41; *Rogers v. Marshall*, 4 McCrary, 307, 15 Fed. 193. But if the rehearing is granted because the court doubts the correctness of the judgment, then the decree should be set aside until the case is reheard.

On Interlocutory Orders.

Rehearings cannot be granted on interlocutory orders. Equity rule 69 provides for them after final decree. *Wooster v. Handy*, 22 Blatchf. 307, 21 Fed. 51; see *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 317; and *Gillette v. Bate Refrigerating Co.* 12 Fed. 108.

Time for Appeal Not Included.

If the petition for rehearing is entertained by the court, then the time for appeal is not included, while the application is pending. *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Northern P. R. Co. v. Holmes*, 155 U. S. 138, 39 L. ed. 99, 15 Sup. Ct. Rep. 28; *Kingman v. Western Mfg. Co.* 170 U. S. 678, 42 L. ed. 1193,

18 Sup. Ct. Rep. 786; Cutting v. Tavares, O. & A. R. Co. 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 155; Texas & P. R. Co. v. Murphy, 111 U. S. 489, 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 497.

Hearing Application After the Term.

We have seen that the jurisdiction of the court to entertain any motion affecting the judgment ends with the term (Linder v. Lewis, 1 Fed. 378; Halsted v. Forest Hill Co. 109 Fed. 822, 823); and we have seen after the term rehearing will not be entertained (Ibid.; Graham v. Swayne, 48 C. C. A. 411, 109 Fed. 367; Williams v. Conger, 131 U. S. 391, 33 L. ed. 201, 9 Sup. Ct. Rep. 793; Bushnell v. Crook Min. & Smelting Co. 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2; Bank of Lewisburg v. Sheffey, 140 U. S. 451, 35 L. ed. 496, 11 Sup. Ct. Rep. 755); Farmers' & M. Bank v. Arizona Mut. Sav. & L. Asso. 135 C. C. A. 577, 220 Fed. 1, but an exception has been recognized, where at the time the decree has been entered some order is made virtually keeping the judgment open for further relief or proceedings (Linder v. Lewis, 1 Fed. 380); or unless the application has been filed at the entry term, but continued over by the court until the next term for rehearing (Graham v. Swayne, 48 C. C. A. 411, 109 Fed. 367; First Nat. Bank v. Woodrum, 86 Fed. 1005; Giant Powder Co. v. California Vigorit Powder Co. 5 Fed. 197; New Orleans v. Fisher, 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. 575; Klein v. Southern P. R. Co. 140 Fed. 213). In this last case it is held the court must continue it over. The mere filing, without action, does not have that effect. In Goddard v. Ordway, 101 U. S. 745, 25 L. ed. 1040; and Aspen Min. & Smelting Co. v. Billings, 150 U. S. 36, 37, 37 L. ed. 988, 989, 14 Sup. Ct. Rep. 4, the above is declared the correct rule if the petition is entertained by the court, and some action, as continuing it, is taken by the court, it goes over as unfinished business. Graham v. Swayne, 48 C. C. A. 411, 109 Fed. 366.

Form of Petition for Rehearing.

You may use the form of application for a new trial in

your State courts, which I assume is familiar to you, but applying strictly the requisites provided by equity rule 69, above referred to. The following may be used:

Title as in bill; addressed to the Honorable Circuit Judges of, etc.

The petition of the defendant C. D. sheweth unto your Honors that, being aggrieved by the decree entered in this cause on the.....day of....., A. D. 19..., by which petitioner was required, etc. (state substance of decree, then grounds of application), wherefore your petitioner humbly prays that your Honors will grant a rehearing, humbly submitting to such orders as the court may make if the application be without merit, etc.

R. F.,
Solicitor, etc.

Facts not apparent of record must be verified by oath of the party, or by some other person. Equity rule 69.

CHAPTER XCIV.

BILL OF REVIEW.

Final decrees in equity may be modified or set aside by appeals within the time prescribed by law, or by a bill of review filed within the time allowed for appeals, or by an original bill in the nature of a bill of review charging fraud or newly discovered evidence. *Huntington v. Little Rock & Ft. S. R. Co.* 3 McCrary, 581, 16 Fed. 906; *Robinson v. Rudkins*, 28 Fed. 8. It is not considered a continuance of the former bill, but in the nature of an original bill. *Home Street R. Co. v. Lincoln*, 89 C. C. A. 133, 162 Fed. 133; but see *Dowagiac Mfg. Co. v. McSherry Mfg. Co.* 84 C. C. A. 38, 155 Fed. 524; contra—see also *Little Rock Junction R. Co. v. Burke*, 13 C. C. A. 341, 27 U. S. App. 736, 66 Fed. 88; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407.

Distinction Between Bill of Review and Rehearing.

There is a distinction between a bill of review and an application for rehearing, which I have already discussed, and the distinction when stated will be a sufficient explanation of the nature of a bill of review.

First. A rehearing is not appealable, and you may appeal from an adverse decision on a bill of review.

Second. You can attack in a rehearing the conclusions of law and fact, whereas in a bill of review you can only attack errors apparent upon the face of the record.

Third. The application for a rehearing must be filed before the end of the entry term, whereas a bill of review may be filed after the term and within the time an appeal may be taken under the statute. *Copeland v. Bruning*, 104 Fed. 170; *Reed v. Stanly*, 38 C. C. A. 331, 97 Fed. 521.

According to the practice in this country a final decree is deemed to be enrolled at the end of the term. *Whiting v. Bank of United States*, 13 Pet. 13, 10 L. ed. 36.

For What Bill of Review Lies.

- First. For error apparent in the record.
- Second. For new matter arising since the decree.
- Third. Newly discovered evidence after the term.
- Fourth. For fraud in procuring the decree.

First. For Error Apparent.

Where an error is apparent on the face of the decree, or in the pleadings or proceedings, and without reference to the evidence, you may correct it by a bill of review. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Home Street R. Co. v. Lincoln*, 89 C. C. A. 133, 162 Fed. 133; *Reed v. Stanly*, 89 Fed. 430; *Irwin v. Meyrose*, 2 McCrary, 244, 7 Fed. 533; *Quinton v. Neville*, 81 C. C. A. 673, 152 Fed. 879; *Allen v. Wilson*, 21 Fed. 884; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 33; *Cocke v. Copenhaver*, 61 C. C. A. 211, 126 Fed. 145. Mr. Daniels in his *Chancery Practice* says that the error in law which will maintain a bill of review must consist of the violation of some statute, or established principle of law or equity, or of the settled practice of the court. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Freeman v. Clay*, 2 C. C. A. 587, 2 U. S. App. 254, 52 Fed. 7, and authorities cited. It must be apparent from the proceedings, pleadings, and decree, without reference to the evidence. *Ibid.* This view has been adopted by the Federal courts in passing upon applications for bills of review. *Bufington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Acord v. Western Pocahontas Corp.* 156 Fed. 989; *Freeman v. Clay*, 2 C. C. A. 587, 2 U. S. App. 254, 52 Fed. 7; *Hoffman v. Knox*, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 490; *Putnam v. Day*, 22 Wall. 65, 22 L. ed. 765; *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 106.

The error must be on the face of the record proper, and not error claimed in the conclusions of law, which is simply a mistake of judgment. *Ibid.*; *Shelton v. Van Kleeck*, 106 U. S. 534, 27 L. ed. 270, 1 Sup. Ct. Rep. 491; *Quinton v. Neville*, 81 C. C. A. 673, 152 Fed. 879; *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 643, 19 Fed. 347; *Reed v. Stanly*, 89

Fed. 430. If the decree is consistent with the record, without considering the evidence, a bill of review will not be allowed. You must appeal to have the evidence considered as a means of correction. *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 106; *Acord v. Western Pocahontas Corp.* 156 Fed. 989.

In *Re Brown*, 213 Fed. 701, it is said a bill of review to correct errors may be filed without leave. See cases cited.

Second. New Matter Arising Since the Decree.

Whatever the new matter may be upon which you base your application for review, it must have arisen *after* the rendition of the decree. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Camp Mfg. Co. v. Parker*, 121 Fed. 195. A change by the Supreme Court of its ruling on a question of law and fact is not such new matter as will sustain a bill of review. *Tilghman v. Werk*, 39 Fed. 680; *King v. Dundee Mortg. & Trust Invest. Co.* 28 Fed. 33. If not error of law, it must be newly discovered evidence to bring the bill. *Irwin v. Meyrose*, 2 McCrary, 244, 7 Fed. 533; *Beard v. Burts*, 95 U. S. 436, 24 L. ed. 486.

Third. On Ground of Newly Discovered Evidence After the Term.

I have already discussed newly discovered evidence as a basis for a rehearing during the term, but after the decree. Where the evidence has been discovered *after* the term and within the time in which a bill of review may be filed, you may make it a basis for a revision of the decree. It must be shown that it was evidence not known, and could not with reasonable diligence have been found before the term expired. *Kelley Bros. v. Diamond Drill & Match Co.* 142 Fed. 868; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364; *Acord v. Western Pocahontas Corp.* 156 Fed. 989; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Birdsboro Steel Foundry & Mach. Co. v. Kelley Bros.* 78 C. C. A. 101, 147 Fed. 713; *Novelty Tufting Mach. Co. v. Buser*, 85 C. C. A. 413, 158 Fed. 83, 84, 14 A. & E. Ann. Cas. 192; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652;

Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 781; Jorgenson v. Young, 69 C. C. A. 222, 136 Fed. 381. In addition you must show that the evidence or new matter is material, and not cumulative, but if cumulative, it is highly pertinent and controlling in its influence. Society of Shakers v. Watson, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; Jourolmon v. Ewing, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 103; Keith v. Alger, 59 C. C. A. 552, 124 Fed. 35; Craig v. Smith, 100 U. S. 234, 25 L. ed. 580. New matter, new evidence, and new witnesses simply for impeaching will not be sufficient. Ibid.; United States v. Throckmorton, 98 U. S. 65, 66, 25 L. ed. 95. Nor when hearsay or otherwise inadmissible. Ward v. Ward, 79 C. C. A. 162, 149 Fed. 204. Nor that new evidence would show the decree technically erroneous, but it must further appear that the party has been deprived of a substantial right. Keith v. Alger, 59 C. C. A. 552, 124 Fed. 32.

A bill of review based on newly discovered evidence is not a matter of right; leave must be granted to file the bill. Hopkins v. Hebard, 114 C. C. A. 261, 194 Fed. 301; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364.

Fourth. For Fraud in Procuring the Decree.

A bill of review will lie for fraud where the fraud alleged was extrinsic to the matters tried, and not fraud raised in the issues, such as fraud practised upon the party, or the court during the trial, or in obtaining the judgment. Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364; Reed v. Stanly, 89 Fed. 431; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 807; Kimberly v. Arms, 40 Fed. 549-558; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 786; Graver v. Faurot, 64 Fed. 243, S. C. 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 262; Terry v. Commercial Bank, 92 U. S. 454-456, 23 L. ed. 620, 621.

Where the fraud arose in procuring the decree it must be attacked by an original bill and independent litigation. Dowagiac Mfg. Co. v. McSherry Mfg. Co. 84 C. C. A. 38, 155 Fed. 524. See United States v. Gleeson, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778, and United States v. Beebe,

34 C. C. A. 321, 92 Fed. 244; Setting Aside Decree for Fraud, chapter 101. As to allegations in bill, see Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 782; White v. Crow, 110 U. S. 184, 28 L. ed. 113, 4 Sup. Ct. Rep. 71; Kimberly v. Arms, 40 Fed. 558; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364.

(See chapter 93, pp. 599, 600, "Rehearing.")

Bill Must Show Why Decree Not Performed.

It is a rule that a bill of review will not be allowed if performance of the decree, or a sufficient reason why it has not been performed, has not been shown, and if not alleged in the bill, it is demurrable. Kimberly v. Arms, 40 Fed. 548; Ricker v. Powell, 100 U. S. 108, 25 L. ed. 528; Wallamet Iron Bridge Co. v. Hatch, 9 Sawy. 643, 19 Fed. 347. But see Davis v. Speiden, 104 U. S. 84, 85, 26 L. ed. 660, 661, when the court may disregard the requirement. If the decree has not been performed, it must ask that the bill be allowed without performance, and especially when it can be shown, or is shown, that the performance would render nugatory the relief sought by the bill of review. Ibid.; Kimberly v. Arms, 40 Fed. 555; Hoffman v. Knox, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 484. The rule, however, would not apply if the decree does not require the party to do anything. Hobbs v. State Trust Co. 15 C. C. A. 604, 30 U. S. App. 393, 68 Fed. 618.

Time of Filing a Bill of Review.

Leave to file a bill of review can only be obtained from the court in which the decree was rendered and enrolled. Camp Mfg. Co. v. Parker, 121 Fed. 195. The time within which a bill of review should be filed is not fixed by statute or rule, but the courts, by analogy, require the bill to be filed within the time allowed by the statute for appeals, and *not after*. Ibid.; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364; Reed v. Stanly, 89 Fed. 431; Jorgenson v. Young, 69 C. C. A. 222.

136 Fed. 381; *Cocke v. Copenhagen*, 61 C. C. A. 211, 126 Fed. 145; *Halsted v. Forest Hill Co.* 109 Fed. 823; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 827; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 32; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 804; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 227, 34 L. ed. 105, 10 Sup. Ct. Rep. 736; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364.

In cases of fraud it is governed by the rule of laches, and the bill should show when the fraud was discovered. *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364. And when it affirmatively appears that the bill was not filed within the period limited for appeals, it is subject to a demurrer; otherwise the issue must be raised by answer to the bill. *Ibid.*; *Copeland v. Bruning*, 104 Fed. 169.

The rule as above stated applies, without exception, where errors appear in the decree or proceedings, because it should be brought within the time in which error could be appealed from. *Taylor v. Charter Oak L. Ins. Co.* 3 McCrary, 484, 17 Fed. 566; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 32; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 804; *Reed v. Stanly*, 89 Fed. 433; *Dunlevy v. Dunlevy*, 38 Fed. 462; *McDonald v. Whitney*, 39 Fed. 467; *Camp Mfg. Co. v. Parker*, 121 Fed. 195. But when founded on new matter or newly discovered evidence, then the review will be allowed, if filed within a reasonable time after discovery. *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Acord v. Western Pocahontas Corp.* 156 Fed. 989. It is largely a question of diligence. *Kissinger-Ison Co. v. Bradford Belting Co.* 59 C. C. A. 221, 123 Fed. 91.

The time for filing a bill of review when based on error apparent being controlled by analogy to the statute giving a certain time for appeal, the rule would be that if the right of appeal lies to the circuit court of appeals, then by the act of March 3, 1891, six months is allowed; but if the right of appeal lies from the circuit to the Supreme Court under section 5 of the act of 1891, then you may sue out a bill of review within two years, that being the time limited for such appeals by Rev. Stat. sec. 1008 (Comp. Stat. 1913, sec. 1649), pro-
S. Eq.—39.

vided, however, that the circuit court certifies within the term that the jurisdiction of the circuit court is involved. Upon failure to so certify there is no right of appeal, and consequently no right to a bill of review. *Reed v. Stanly*, 97 Fed. 521; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 837; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 33; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364.

Leave of Court to File.

Where the application for a bill of review is based on error apparent in the decree or the proceedings, it may be filed as of right without leave of the court. *Acord v. Western Pocahontas Corp.* 156 Fed. 989-996; *Ricker v. Powell*, 100 U. S. 104, 25 L. ed. 527; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Ritchie v. Burke*, 109 Fed. 16; *Copeland v. Bruning*, 104 Fed. 170; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809; *Thompson v. Schenectady R. Co.* 119 Fed. 638; *Lewis v. Holmes*, 116 C. C. A. 408, 194 Fed. 842; *Farmers & M. Bank v. Arizona Mut. Sav. & L. Asso.* 135 C. C. A. 577, 220 Fed. 7, and cases cited. It is regarded as in the nature of a writ of error; so also when filed to set aside for fraud (*Ritchie v. Burke*, 109 Fed. 16; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 807); but when based on newly discovered facts *dehors* the record, then permission to file the bill must be granted by the court (*Acord v. Western Pocahontas Corp.* 156 Fed. 995; *Ricker v. Powell*, 100 U. S. 107, 25 L. ed. 528; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809; *Camp Mfg. Co. v. Parker*, 121 Fed. 196); and it rests entirely in the court's discretion (*Thomas v. Brockenbrough*, 10 Wheat. 151, 6 L. ed. 289; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 808. See *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 226, 34 L. ed. 104, 10 Sup. Ct. Rep. 736).

When the bill rests partly on grounds requiring leave to file and partly on errors of law, leave to file must be granted; or a motion to dismiss the bill will be allowed, as it must be treated as a whole. *Kimberly v. Arms*, 40 Fed. 558; *Ricker v. Powell*, 100 U. S. 109, 25 L. ed. 528.

Leave to file a bill of review must be obtained from the court rendering the decree. *Camp Mfg. Co. v. Parker*, 121 Fed. 195.

Not Appealable.

When the granting of a bill of review is discretionary, the granting or refusing is not appealable, but proceedings after granting are. *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 808, 809.

Form to Be Used.

Title as in bill; address to the District Judge for.....District of

Applicant (as plaintiff) vs. all other parties to the original suit as defendants.

Your petitioner would show unto your Honors that on the.....day of, A. D. 19..., C. D. hereinafter styled defendant, exhibited his bill of complaint in the United States District Court for the.....District of.....against your petitioner, and therein he alleged (state substance of bill).

That your petitioner appeared and answered said bill on the.....day of....., A. D. 19..., as follows (here state substance of answer); that issue was joined and proof taken and the cause heard on the.....day of....., A. D...., when a decree was rendered and recorded in said cause as follows (here insert decree).

Your petitioner here shows unto your Honors that said decree is erroneous and it would be inequitable to permit it to stand as entered in this cause for that (here insert errors complained of).

That no decree should have been rendered, but the bill should have been dismissed.

That in consideration of the error thus apparent your petitioner prays that it be reviewed and reversed, and no further proceedings taken thereon. to the end, therefore, that the defendant may show cause why the petitioner should not have the relief prayed for, your petitioner prays that a subpœna be directed to the said C. D., defendant, commanding him at a certain time to show cause why the decree should not be reviewed and reversed as prayed for.

R. F.,
Solicitor, etc.

Swear to the petition as follows:

I, A. B., plaintiff in the foregoing petition for review, being duly sworn, say that I have read the same and that the matters and things set forth therein are true.

A. B.
Plaintiff.

Sworn to before me this.....day of....., A. D. 19...

Notary.

If the petition rests upon new matter arising since the decree, or newly discovered evidence, you must set forth that:

Since the time of rendering and recording the decree, you have discovered new matter, or new evidence material to the case, which is as follows: (Here insert specifically the new matter or the new evidence discovered, with averments to show materiality. If new evidence, attach, if possible, the affidavits of the newly discovered witnesses, showing the new evidence and show specifically that you were not in default in discovering the evidence sooner.) Then proceed—

Wherefore said decree should be reviewed, reversed, and set aside, and to the end that plaintiff should be permitted to prove the matter aforesaid, he prays process of subpœna, etc.

If the decree is such that you are required to perform some act, etc., set up why you have not done so as has been previously stated.

Parties to Bills of Review.

The rule is that all parties to the original suit must be made parties to a bill of review. The applicant is plaintiff, and all other parties are defendants, if necessary parties. *King v. Dundee Mortg. & T. Invest. Co.* 28 Fed. 33; *Frankfort v. Deposit Bank*, 120 Fed. 167, 168; *Perkins v. Hendryx*, 127 Fed. 448, Same, 149 Fed. 526; *Thompson v. Maxwell Land-Grant & R. Co.* 95 U. S. 397, 24 L. ed. 483. However, if codefendants were not necessary parties in the original bill they may be omitted. *Id.*

Who May Attack Decree.

Creditors appearing before a master in a creditors' suit, who have filed intervening petitions to prove their claims, become parties to the record, and may attack the decree by petition (*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 171); but not parties brought into appellate proceedings by citation, who do not avail themselves of the opportunity of appeal. *Ibid.*

A party accepting the benefit of a decree cannot review it (*Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 654), or where he

disclaims interest. *Brigham City v. Toltec Ranch Co.* 41 C. C. A. 222, 101 Fed. 85.

Bill of Review After Appeal.

A bill of review will not be sustained if an appeal has been applied for and allowed, but not an attempted appeal when there was no right of appeal, if bill of review is filed in time. *Ensminger v. Powers*, 108 U. S. 302, 303, 27 L. ed. 736, 2 Sup. Ct. Rep. 643; *Kimberly v. Arms*, 40 Fed. 548-551; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 838, 839. However, such appeal does not operate to suspend the time in which the bill of review should have been sued out (*Ibid.*; see *Ensminger v. Powers*, 108 U. S. 302, 27 L. ed. 736, 2 Sup. Ct. Rep. 643), nor can it be brought in the circuit court after the case has been passed upon by the appellate court (*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 171-175; *Central Trust Co. v. Evans*, 19 C. C. A. 563, 43 U. S. App. 214, 73 Fed. 562; *Southard v. Russell*, 16 How. 547-570, 14 L. ed. 1052-1062; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Durant v. Essex Co. (Durant v. Storrow)* 101 U. S. 555, 25 L. ed. 961; *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 866; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809; see *Watson v. Stevens*, 53 Fed. 31, as to granting right in mandate; *Kingsbury v. Buckner*, 134 U. S. 671, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638); but you may apply to the appellate court for permission to file a bill of review (*Novelty Tufting Mach. Co. v. Buser*, 85 C. C. A. 413, 158 Fed. 83, 14 Ann. Cas. 192; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co.* 74 C. C. A. 521, 143 Fed. 321; *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; *Seymour v. White County*, 34 C. C. A. 240, 92 Fed. 115; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 781; *Frankfort v. Deposit Bank*, 120 Fed. 165; *McClintock v. Pawtucket*, 180 Fed. 320); and this may be done after case is affirmed and mandate issued, if based on newly discovered evidence (*Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co.* 74 C. C. A. 521, 143 Fed. 321; *Municipal Signal Co. v. Gamewell Fire Alarm Teleg. Co.* 77 Fed. 452;

Re Gamewell Fire Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 785).

It was held, however, in Rector v. Fitzgerald, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808-811, that the pending application for a bill of review was not so far *lis pendens* as to affect a sale under the decree, when sold in good faith by the successful party.

While a bill of review will not lie after an appeal, except with the permission of the appellate court, yet an original bill in the nature of a bill of review may be filed in the court in which the original judgment was obtained, without permission, when sought to be set aside for fraud (Ritchie v. Burke, 109 Fed. 16, and see Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 786), if the fraud was practiced upon the court, or the party during the trial, and not involved in the subject-matter of the litigation, or the issues that were tried. See Graver v. Faurot, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; Marshall v. Holmes, 141 U. S. 596-599, 35 L. ed. 872-874, 12 Sup. Ct. Rep. 62.

Who to Determine Application.

When an order of the circuit court of appeals stays the mandate the case is kept in the jurisdiction of that court (Burget v. Robinson, 59 C. C. A. 260, 123 Fed. 262), and the leave to file a bill of review in the court below must be made to the circuit court of appeals, but the court below must determine the application on its merits. Frankfort v. Deposit Bank, 59 C. C. A. 539, 124 Fed. 18.

After mandate is sent down it should be tried in the circuit court of appeals unless facts arose in the court below after mandate, in which case, for convenience, the circuit court of appeals will require the court below to hear it. Keith v. Alger, 59 C. C. A. 552, 124 Fed. 32.

CHAPTER XCV.

VACATING DECREE.

No rule is better settled than that a Federal court cannot vacate a decree after the term, except in equity upon bills of review, or upon writs of error coram vobis in cases at law (*United States v. Aakervik*, 180 Fed. 137-143; *Miocene Ditch Co. v. Champion Min. & Trading Co.* 117 C. C. A. 61, 197 Fed. 498; *Wellman v. Bethea*, 213 Fed. 370; *Allen v. Wilson*, 21 Fed. 881; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530, and cases cited; *McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 146, 104 Fed. 709; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Austin v. Riley*, 55 Fed. 833; *Doe v. Waterloo Min. Co.* 60 Fed. 643; *Petersburgh Sav. & Ins. Co. v. Dellatorre*, 17 C. C. A. 310, 30 U. S. App. 504, 70 Fed. 645; *Manning v. German Ins. Co.* 46 C. C. A. 144, 107 Fed. 53; *Farmers' Loan & T. Co. v. Iowa Water Co.* 80 Fed. 467; *Craven v. Canadian P. R. Co.* 62 Fed. 171; *Mootry v. Grayson*, 44 C. C. A. 83, 104 Fed. 613; *Wetmore v. Karrick*, 205 U. S. 141, 51 L. ed. 745, 27 Sup. Ct. Rep. 434; *Pollitz v. Wabash R. Co.* 180 Fed. 951), unless for want of jurisdiction (*Pollitz v. Wabash R. Co.* 180 Fed. 951), or unless a motion to vacate was made at the term in which the decree was entered, and continued over by the court (*Stuart v. St. Paul*, 63 Fed. 644; *Graham v. Swayne*, 48 C. C. A. 411, 109 Fed. 366; *Amy v. Watertown*, 130 U. S. 313, 32 L. ed. 950, 9 Sup. Ct. Rep. 530), or unless for fraud, as before stated.

(See *Fraud in Procuring Decree*, chapter 94.)

After the circuit court of appeals has affirmed the decree, the circuit court cannot entertain a bill to modify or vacate it. (See "Bill of Review.") *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 171; *Re Sanford Fork & Tool Co.* 160 U. S. 255, 40 L. ed. 416, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 266, 41 L. ed. 995, 17 Sup. Ct. Rep. 520; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 552; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910;

Walker v. Brown, 86 Fed. 365; Illinois ex rel. Hunt v. Illinois C. R. Co. 34 C. C. A. 138, 91 Fed. 957.

Setting Aside Decree for Fraud.

When the fraud alleged is extrinsic to the matters tried, such as when practised upon the court, or a party whereby his case was not fully presented, a bill of review will lie; but the question has arisen whether by an original bill, or a bill in the nature of a bill of review, you can set aside a decree for fraud, which consisted in false swearing and perjury by witnesses in the case. Graver v. Faurot, 64 Fed. 241, 242. In considering this case the court calls attention to a distinct conflict between the Throckmorton Case, in 98 U. S. 61, 25 L. ed. 93, and the case of Marshall v. Holmes, in 141 U. S. 598, 35 L. ed. 873, 12 Sup. Ct. Rep. 62.

In the former case it was decided that only when the fraud is of such a character that it is apparent that there was no real contest or hearing of the case by reason of it, will the bill be maintained; and that a judgment founded on a fraudulent instrument, as in the case at bar, or on perjury or false swearing, could not be set aside by an original bill, or a bill in the nature of a bill of review.

In Marshall v. Holmes the judgment was obtained on an alleged forged and false instrument, and the court entertained an original bill to set the judgment aside. The court says: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or was prevented from doing so by fraud or accident unmixed with negligence, will justify an application to chancery." Perry v. Johnston, 95 Fed. 323-325.

The principle announced is undoubtedly correct, but clearly not applicable to the facts of the case at bar as a ground to sustain an original bill to set the judgment aside. Several efforts seem to have been made to get the Supreme Court to settle the conflict, but it declined to do so. (See "Fraud in Procuring Decree," chapter 94). Graver v. Faurot, 162 U. S. 436, 40 L. ed. 1031, 16 Sup. Ct. Rep. 799.

In Graver v. Faurot, 64 Fed. 241, the judgment was at-

tacked on the ground that it was procured by false swearing and perjury, and the court, unable to reconcile the cases, followed the Throckmorton Case.

In *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778, a case arose where the judgment was sought to be set aside on the ground that it was procured by perjury, and the court followed the Throckmorton Case and dismissed the bill. *Brooks v. O'Hara*, 8 Fed. 533; *Kimberly v. Arms*, 40 Fed. 558; *Vance v. Burbank*, 101 U. S. 519, 25 L. ed. 931; *United States v. Throckmorton*, 98 U. S. 66, 25 L. ed. 95; *Holton v. Davis*, 47 C. C. A. 246, 108 Fed. 150.

In these cases it seems settled that a decree will not be set aside upon the attack of one of the parties to it by an original bill, or a bill in the nature of a bill of review, upon the ground of fraud in procuring it, unless the fraud is extrinsic or collateral. *Ibid.*; *Nelson v. Meehan*, 12 L.R.A.(N.S.) 374, 83 C. C. A. 597, 155 Fed. 9; *United States v. Beebe*, 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371; *Bailey v. Williford*, 126 Fed. 803, *Same Case*, 69 C. C. A. 226, 136 Fed. 382; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Graver v. Faurot*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 260; *United States v. White*, 9 Sawy. 125, 17 Fed. 562; *Reed v. Stanly*, 89 Fed. 433; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 786; *United States v. Minor*, 26 Fed. 672; *Andes v. Millard*, 70 Fed. 517.

Bill to Impeach Consent Decree.

A bill will not lie to impeach a consent decree (*Thompson v. Maxwell Land Grant & R. Co.* 95 U. S. 391, 24 L. ed. 481), unless consent without authority. (*White v. Joyce* [*White v. Miller*] 158 U. S. 147, 39 L. ed. 928, 15 Sup. Ct. Rep. 788; but see *Craven v. Canadian P. R. Co.* 62 Fed. 171).

On Ground of Mistake or Accident.

A circuit court may entertain a bill to set aside a decree on the ground of mistake, accident, or surprise, though the time for appeal or bill of review has passed. (See *Dewey v. Strat-*

ton, 52 C. C. A. 135, 114 Fed. 179; Perkins v. Hendryx, 149 Fed. 526, S. C. 52, C. C. A. 435, 114 Fed. 801-821; Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 786; Marshall v. Holmes, 141 U. S. 589, 25 L. ed. 870, 12 Sup. Ct. Rep. 62; Nelson v. First Nat. Bank, 70 Fed. 526), but not after nine years (Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801).

Third Party Impeaching Decree.

One not a party to a suit may, with leave of the court, attack by original bill in the nature of a bill of review, a judgment or decree obtained by the fraud of one of the parties, if it affects his interests (Thompson v. Schenectady R. Co. 119 Fed. 634-638; Richardson v. Loree, 36 C. C. A. 301, 94 Fed. 375; See Sage v. Central R. Co. 93 U. S. 419, 23 L. ed. 935; Wood v. Davis, 108 Fed. 130; Cutter v. Iowa Water Co. 96 Fed. 777); and it is discretionary with the judge to whom application is made to require, or not, notice to the defendant (Thompson v. Schenectady R. Co. 119 Fed. 638).

Evidence that false testimony was produced and used knowingly in the trial would not of itself be sufficient, unless it appears with reasonable certainty that but for the perjury the judgment would not have been obtained (Wood v. Davis, 108 Fed. 130); that is, it must appear that the judgment or decree had no other ground to sustain it but the false evidence or fraud perpetrated (Holton v. Davis, 47 C. C. A. 246, 108 Fed. 150).

CHAPTER XCVI.

APPEAL.

We have reached a point in the case when effort in the lower court is at an end, and you must now appeal.

Two Methods.

There are two methods by which causes are taken to the higher courts for revision.

First. By appeal.

Second. By writ of error. Re Issuing Writs of Error, 117 C. C. A. 603, 199 Fed. 115, and cases cited.

Appeal is the method by which equity cases are reviewed (Thomson v. Travelers' Ins. Co. 89 C. C. A. 61, 161 Fed. 868; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Frankfort v. Deposit Bank, 62 C. C. A. 492, 127 Fed. 814, and cases cited; Carino v. Insular Government, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Nelson v. Lowndes County, 35 C. C. A. 419, 93 Fed. 538; Jabine v. Oates, 115 Fed. 862; Toeg v. Suffert, 92 C. C. A. 577, 167 Fed. 125), while a writ of error applies to cases on the law side of the court. In the former—that is, by appeal—the whole case, both law and fact, is taken up for examination on its merits (Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co. 110 C. C. A. 200, 188 Fed. 164; Central Improv. Co. v. Cambria Steel Co. 120 C. C. A. 121, 201 Fed. 811; Harry Bros. Co. v. Yaryan Naval Stores Co. 135 C. C. A. 454, 219 Fed. 884); while by the latter only points of law can be reviewed (Dower v. Richards, 151 U. S. 663, 38 L. ed. 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 246, 41 L. ed. 988, 17 Sup. Ct. Rep. 581), except that in cases where appeals are allowed directly from a State court to the Supreme Court of the United States, the cause, whether in law or equity, is taken up on a writ of error from the Supreme Court (Dower

v. Richards, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 175), and the question must be one of law, and not of fact.

The appeal, then, being the only mode by which a decree in chancery can be carried from an inferior Federal court to the appellate courts for re-examination on its merits, I shall only discuss appeals, and not writs of error, except as this method of appeal may incidentally arise.

Acts Governing Appeals.

On March 3, 1891, the existing Federal system governing appeals was established. 26 Stat. at L. 826, chap. 517 (Comp. Stat. 1913, sec. 1108), Title "Judiciary."

It was an act entitled an act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Under this act a circuit court of appeals was created in each circuit, and the appellate jurisdiction established as follows:

By section 5 it is provided that appeals or writs of error may be taken from the district courts, or from the existing circuit courts to the Supreme Court *direct*, in the following cases (Ibid.; sec. 5, p. 549):

First. When the jurisdiction of the lower court is in issue, in which case the question of jurisdiction alone shall be *certified* to the Supreme Court from the court below for decision.

Fourth. In any case that involves the construction or application of the Constitution of the United States.

Fifth. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

Sixth. In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

These clauses of the act of 1891 extended the act of February 25, 1889, authorizing appeals from the circuit to the Supreme Court without reference to amount when the jurisdiction of the circuit court was involved. See U. S. Stat. at L. vol. 25, p. 693, chap. 236.

Appeal From State Courts.

It is further provided in the act, that nothing therein contained shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of the State, nor of the statute providing for a review of such cases. U. S. Rev. Stat. sec. 709, 710, 1003 (Comp. Stat. 1913, sec. 1662).

Circuit Court of Appeals.

These sections thus provide for a direct appeal to the Supreme Court of the United States from the circuit and district courts, under the special conditions therein named, and section 6 of the act provides that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error *final* decisions in the district and circuit courts of the United States *in all cases other than* provided for in the above sections, unless otherwise provided by law.

Final Appellate Jurisdiction of Circuit Court of Appeals.

Section 6 then proceeds to give to the circuit court of appeals *final appellate* jurisdiction in all cases in which the jurisdiction of the circuit courts depended entirely on diversity of citizenship, or between aliens and citizens of the United States; also when the cases arise under the patent laws, revenue, and criminal laws, and in admiralty cases. Here note the fact, that to be *final* in the circuit court of appeals the jurisdiction of the lower court must rest *entirely* on diversity, etc.; if there be any other ground besides diverse citizenship, or grounds stated in said section, the jurisdiction of the circuit court of appeals is not final. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 249, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; see also *Sonnenhiel v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Huguley Mfg. Co. v. Galton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Harding v. Hart*, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 846; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct.

Rep. 740; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

While the appellate jurisdiction of the circuit court of appeals is final, so far as the parties to the litigation are concerned, yet it is specially provided in section 6 that the circuit court of appeals may certify any question to the Supreme Court concerning which it desires instruction, or the Supreme Court may require any case made final in said circuit court of appeals, by certiorari or otherwise, to be certified to the said court for its review and determination.

See section 128, chapter 6, New Code (Comp. Stat. 1913, sec. 1120), embodying section 6 of the act of 1891.

Appeal from Circuit Court of Appeals to Supreme Court.

In all cases that are carried to the circuit court of appeals, in which its appellate jurisdiction is not final, there shall be by right, an appeal, or writ of error, or review of the case by the Supreme Court, where the matter in controversy shall exceed one thousand dollars, besides costs; and one year, and no more, from the entry of the order, judgment or decree, is given in which to take the appeal. *Northern P. R. Co. v. Amato*, 144 U. S. 471, 472, 36 L. ed. 508, 509, 12 Sup. Ct. Rep. 740.

As to appeals from bankrupt courts, see *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 363.

Appeal from Interlocutory Order.

By section 7 of the act of 1891, a new feature was added to the appellate system of the United States (*Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 811); that is, an appeal in equity is permitted from an interlocutory order *granting* or *continuing* an injunction during the progress of the cause in all cases in which an appeal would lie from the final decrees to the circuit court of appeals. *Ibid.*; 26 Stat. at L. 828, chap. 517 (Comp. Stat. 1913, sec. 1121)—Title Judiciary; *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso.* 91 C. C. A. 39, 165 Fed. 1; *Union P. R. Co. v. Oregon & W. Lumber Mfrs. Asso.* 91 C. C. A. 51, 165 Fed. 13; *Taylor v. Breese*, 90 C. C. A. 558, 163 Fed.

679-686. Interlocutory order denied in *Taylor v. Breese*, supra, p. 684.

By sections 13 and 15 of the act the appellate jurisdiction of the Supreme and Circuit Court of Appeals over the Territorial courts is provided for.

TIME WITHIN WHICH TO TAKE AN APPEAL.

Appeals to the Supreme Court.

Section 5 of the act of 1891 enumerates the cases in which an appeal may be taken direct from the circuit and district courts to the Supreme Court of the United States. The time for an appeal in these cases is fixed by the old law, U. S. Rev. Stat. sec. 1008 (Comp. Stat. 1913, sec. 1649), at two years from the entry of the decree, judgment, or order, saving disabilities, in which cases the period begins to run after the disability is removed. See *Danville v. Brown*, 128 U. S. 503, 32 L. ed. 507, 9 Sup. Ct. Rep. 149.

In prize cases an appeal must be sued out in thirty days from the rendition of the decree, unless time is extended or the Supreme Court authorizes the appeal after the time. U. S. Rev. Stat. secs. 1006, 1009, 4636 (Comp. Stat. 1913, secs. 1665, 1650, 8413).

From Circuit Court of Appeals to the Supreme Court.

By section 6 of the act of 1891 an appeal must be sued out of the circuit court of appeals to the Supreme Court within *one* year after the entry of the order or decree sought to be reviewed, in all cases in which the decision of the circuit court of appeals is not made final.

Appeals from Highest Court of State to Supreme Court of the United States.

Appeals from the highest court of a State to the Supreme Court must be sued out within two years from the entry of the decree. U. S. Rev. Stat. secs. 1008, 709 (Comp. Stat. 1913, sec. 1649).

Appeals to Circuit Court of Appeals.

By section 11 of the act of 1891 no appeal can be sued out to the circuit court of appeals, authorized by section 6 of the same act, except within six months after the entry of the decree. Comp. Stat. 1913, sec. 1120; *Baxter v. Bevil Phillips & Co.* 219 Fed. 309, Comp. Stat. 1913, sec. 1647.

By section 7 of the act of 1891 appeals from interlocutory orders *granting* or *continuing* an injunction are allowed, provided they are taken within thirty days from the entry of the decree or order.

There are other shorter terms of appeal provided by special acts, as by section 16 of the interstate commerce act, by which an appeal is required to be taken within twenty days from the judgment, but a review of these acts is not necessary to my purpose.

I have thus given the material features of the act of 1891, establishing the circuit court of appeals and regulating appellate jurisdiction over the inferior courts, and of which act it has been said by the Supreme Court of the United States "that it is so variant, and its provisions so comprehensive, that it must be taken as a substitute for all former acts governing appeals, and may be considered as furnishing the exclusive rules in respect to the appellate jurisdiction of the Federal courts." *The Habana*, 175 U. S. 684, 44 L. ed. 322, 20 Sup. Ct. Rep. 290; *Fisk v. Henarie*, 142 U. S. 459-468, 35 L. ed. 1080-1082, 12 Sup. Ct. Rep. 207.

CHAPTER XCVII.

PRACTICE AS TO APPEALS.

By the latter clause of section 11 of the act of 1891, 26 Stat. at L. 829, chap. 517 (Comp. Stat. 1913, sec. 1651), it is provided that all provisions of law now in force regulating the method and system of review through appeals or writs of error shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds and allowance of appeals. As to the laws in force and referred to, see U. S. Rev. Stat. from sec. 997 to sec. 1013, inclusive; Comp. Stat. 1913, secs. 1653-1655; see also the rules of the Supreme Court and circuit court of appeals. The various provisions of the statutes and rules referred to will be discussed as we proceed; and first:

As to Appeals from Interlocutory Decrees.

We have seen, in stating the provisions of the act of 1891, that the appellate jurisdiction is now divided between the Supreme Court and the circuit court of appeals (*McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118), the division being clearly defined. We have seen also that there are two kinds of decrees from which an appeal may be taken, which was a new departure in the practice of the Federal courts.

First. Interlocutory decrees.

Second. Final decrees.

And the rule may be stated thus: The appellate jurisdiction of the circuit court of appeals is restricted to reviewing *final* decrees, with the single exception of the power to review interlocutory orders *granting* or *continuing* an injunction (*Robinson v. Belt*, 5 C. C. A. 521, 12 U. S. App. 431, 56 Fed. 328), or appointing receivers, added by act of June 6, 1900.

INTERLOCUTORY DECREES.

Acts Governing Appeals.

To understand the decisions under section 7 of the act of 1891, permitting appeals from interlocutory orders granting or continuing an injunction, a brief review of successive changes is necessary. The original act, as stated, permitted appeals from interlocutory orders only when they *granted* or *continued* an injunction. Sec. 7, act of 1891. In 1895 (see 28 Stat. at L. 666, chap. 96, Comp. Stat. 1913, sec. 1121). Congress amended this section, and enlarged its scope by adding the words "or refusing or dissolving an injunction." *Re Tampa Suburban R. Co.* 168 U. S. 588, 42 L. ed. 590, 18 Sup. Ct. Rep. 177. New Code sec. 129 (Comp. Stat. 1913, sec. 1121).

By the act of June 6, 1900, Congress amended the seventh section of the act without mentioning the act of 1895, and as amended the seventh section read substantially that when on hearing in equity by a judge in vacation, or in open court, an injunction shall be granted or continued, or a receiver is appointed by interlocutory order, the same may be appealed from. *Joseph Dry Goods Co. v. Hecht*, 57 C. C. A. 64, 120 Fed. 760.

This act of 1900 has been construed to mean a repeal of the act of 1895, and now interlocutory orders *granting* or *continuing* an injunction can only be appealed from, and the right of appeal does not extend to refusing or dissolving an injunction. *Columbia Wire Co. v. Boyce*, 44 C. C. A. 588, 104 Fed. 173; *March v. Romare*, 53 C. C. A. 574, 116 Fed. 354; *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* 44 C. C. A. 92, 104 Fed. 622; *Heinze v. Butte & B. Consol. Min. Co.* 46 C. C. A. 219, 107 Fed. 167; *Western Electric Co. v. Williams-Abbott Electric Co.* 48 C. C. A. 159, 108 Fed. 953; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750; *Shumaker v. Security Life & Annuity Co.* 86 C. C. A. 302, 159 Fed. 112; *Southern R. Co. v. Carolina Coal & Ice Co.* 81 C. C. A. 15, 151 Fed. 477; *Star Brass Works v. General Electric Co.* 63 C. C. A. 604, 129 Fed. 102; *Lewis v. Hitchman Coal & Coke Co.* 100 C. C. A. 137, 176 Fed. 549; *National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co.* 44 C. C. A. 664, 105 Fed. 670.

Section 7 of the acts of 1891 and 1900 was again amended in April, 1906, as follows: That where, upon a hearing in equity by a judge in a district or circuit court, or by a judge in vacation, an injunction shall be granted or continued or a receiver appointed by an interlocutory order, an appeal may be taken, provided it is taken in thirty days from the entry of the order, and it shall have precedence in the appellate court; but the proceedings are not stayed unless so specially ordered, and the court may require an additional bond. *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 A. & E. Ann. Cas. 997; *Root v. Mills*, 94 C. C. A. 174, 168 Fed. 688; *Lewis v. Hitchman Coal & Coke Co.* 100 C. C. A. 137, 176 Fed. 549; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 A. & E. Ann. Cas. 997; *Southern R. Co. v. Carolina Coal & Ice Co.* 81 C. C. A. 15, 151 Fed. 477. See Fed. Stat. Anno. Supp. 1907, p. 192. The cases under the Act of 1895 are no longer authority. *Columbia Wire Co. v. Boyce*, 44 C. C. A. 588, 104 Fed. 172; *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* 44 C. C. A. 92, 104 Fed. 622; *Rowan v. Ide*, 46 C. C. A. 214, 107 Fed. 161.

See sec. 129, New Code, chap. 6 (Comp. Stat. 1913, sec. 1121), effective January 1st, 1912, allowing appeals from decrees or orders granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver. *American Grain Separator Co. v. Twin City Separator Co.* 120 C. C. A. 644, 202 Fed. 202; *J. D. Randall Co. v. Foglesong Mach. Co.* 119 C. C. A. 185, 200 Fed. 741.

Appeal, How Limited.

The next point to be observed is that an appeal from the interlocutory order, as above stated, is dependent upon the fact that an appeal would lie to the *circuit court of appeals* from a final decree in the main case. *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 24 C. C. A. 195, 33 U. S. App. 734, 78 Fed. 517, 518; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 514, 8 A. & E. Ann. Cas. 997; *Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781; *Stafford v. King*, 32 C. C. A. 536, 61 U. S. App. 487, 90 Fed.

140. Where the Supreme Court alone would have appellate jurisdiction under section 5 of the act of 1891, there would be no appellate jurisdiction of an interlocutory decree rendered in such case, was held to be the rule in *Wright v. MacFarlane*, 58 C. C. A. 570, 122 Fed. 770, 771, and cases cited above; but it is now held, under the act amending section 7 of March, 1906, above referred to, that an appeal to the circuit court of appeals can be had from an interlocutory order, etc., though a question of jurisdiction be the only issue. *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 514, 8 A. & E. Ann. Cas. 997. See *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 24 C. C. A. 195, 33 U. S. App. 734, 78 Fed. 518.

Time of Appeal.

The next point to be observed in appeals of this character is that it must be taken in thirty days from the entry of the order, or you lose your right. Sec. 7, act of 1891, sec. 129, New Code (Comp. Stat. 1913, sec. 1121); *Re Haberman Mfg. Co.* 147 U. S. 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527. This short time given is for the protection of the defendant. *Rowan v. Ide*, 46 C. C. A. 214, 107 Fed. 161. See Fed. Stat. Anno. Supp. 1907, p. 192; *Root v. Mills*, 94 C. C. A. 174, 168 Fed. 688; *J. D. Randall Co. v. Foglesong Mach. Co.* 119 C. C. A. 185, 200 Fed. 742.

Bond in Interlocutory Appeals.

By original rule 13, section 2, of the rules governing the circuit court of appeals, it is provided that on all appeals from any interlocutory order or decree granting or continuing an injunction in the circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of the court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal. The amount rests in the discretion of the court. *Barcus v. Sherwood*, 69 C. C. A. 200, 136 Fed. 184; *Martin v. Hazard Powder Co.* 93 U. S. 302, 23 L. ed. 885.

Effect of Appeal on Injunction.

In appeals from decrees granting, continuing, or dissolving injunctions, the giving of bond grants the appeal, but does not affect the order as to the injunction, whether the bond be in form a supersedeas or not. In this respect it differs from appeals in ordinary chancery suits, where giving a supersedeas bond operates as a supersedeas. *Lownsdale v. Gray's Harbor Boom Co.* 117 Fed. 982. The rule, then, is that an appeal from granting or continuing or dissolving an interlocutory injunction has no effect whatever on the injunction. The judge may, on allowing the appeal, make such modifications of the injunction as he sees proper under the particular circumstances; that is, he may suspend or change it or restore as he sees proper, or as to him may appear equitable, but the giving of bond and notice of appeal has no effect as a supersedeas. Equity rule 74; Proviso sec. 7, act of 1891; and amendments above referred to. See sec. 129, New Code, chap. 6 (Comp. Stat. 1913, sec. 1121), embodying old law. *Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923; *Knox County v. Harshman*, 132 U. S. 16, 33 L. ed. 250, 10 Sup. Ct. Rep. 8; *Interstate Commerce Commission v. Louisville & N. R. Co.* 101 Fed. 146; see *Shelby Steel Tube Co. v. Delaware Seamless Tube Co.* 161 Fed. 798; *Timolat v. Philadelphia Pneumatic Tool Co.* 130 Fed. 903; *Re Haberman Mfg. Co.* 147 U. S. 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527; *Crown Cork & Seal Co. v. Standard Stopper Co.* 69 C. C. A. 200, 136 Fed. 184; *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 790; *American Strawboard Co. v. Indianapolis Water Co.* 26 C. C. A. 470, 46 U. S. App. 526, 81 Fed. 423; *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; see *National Heeling Mach. Co. v. Abbott*, 77 Fed. 464, 465, where supersedeas allowed to avoid closing a business.

So an order which keeps *in statu quo* the property in litigation will not be disturbed on appeal unless there has been a gross abuse of discretion. *Shea v. Nelima*, 66 C. C. A. 263, 133 Fed. 216, and cases cited. Again, the appeal does not affect the power of the trial court to proceed with the cause in respect to any matter not involved in the appeal. *Ex parte National Enameling & Stamping Co.* 201 U. S. 156, 50 L. ed.

707, 26 Sup. Ct. Rep. 404; Cuyler v. Atlantic & N. C. R. Co. 132 Fed. 568.

Rule Governing the Court of Appeals in Considering Interlocutory Appeals.

The court of appeals will not reverse, unless improvidently granted and hurtful (*Workingmen's Amalgamated Council v. United States*, 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; *Rahley v. Columbia Phonograph Co.* 58 C. C. A. 639, 122 Fed. 625; *Southern P. Co. v. Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690; *Thompson v. Nelson*, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339; *Duplex Printing-Press Co. v. Campbell-Printing Press & Mfg. Co.* 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 250; see *Northern Securities Co. v. Hariman*, 67 C. C. A. 245, 134 Fed. 331, for exception), which should be made clearly to appeal. *Kerr v. New Orleans*, 61 C. C. A. 450, 126 Fed. 920; *Massie v. Buck*, 62 C. C. A. 535, 128 Fed. 27; *Acme Acetylene Appliance Co. v. Commercial Acetylene Co.* 112 C. C. A. 573, 192 Fed. 321; *Texas Traction Co. v. Barron G. Collier*, 115 C. C. A. 82, 195 Fed. 65; *Love v. Atchison, T. & S. F. R. Co.* 107 C. C. A. 403, 185 Fed. 322; *Crescent Specialty Co. v. National Fireworks Distributing Co.* 135 C. C. A. 28, 219 Fed. 130. Nor will it on motion remand the cause for further proceeding without reversing after examination on merits. *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 961. It will on proper application dismiss an appeal without prejudice to appellant, if appellee is not unduly prejudiced (*Ibid.*); and it seems upon request of trial judge, it will dismiss an appeal for defendant to file a bill of review on newly discovered evidence. *Mossberg v. Nutter*, 60 C. C. A. 98, 124 Fed. 966; see *Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 810.

Entering Decree on Merits.

The question has often arisen as to the right of the appellate court to enter a decree on the merits of the whole case, when the case has been appealed under section 7 of the act of 1891;

and while there has been some conflict of authority, yet the rule seems to be established, that where the nature of the case permits, the appellate court will end the litigation, and enter a decree on the merits. *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; *Berliner Gramophone Co. v. Seaman*, 49 C. C. A. 99, 110 Fed. 33; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; *Texas Consol. Compress & Mfg. Asso. v. Storrow*, 34 C. C. A. 182, 92 Fed. 10; *Re Tampa Suburban R. Co.* 168 U. S. 588, 42 L. ed. 590, 18 Sup. Ct. Rep. 177; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545; *Tornanses v. Melsing*, 47 C. C. A. 596, 109 Fed. 710; *Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 810; *Co-operating Merchants' Co. v. Hallock*, 64 C. C. A. 104, 128 Fed. 596-598; *Harriman v. Northern Securities Co.* 197 U. S. 287, 49 L. ed. 760, 25 Sup. Ct. Rep. 493, and cases cited; *Chapman v. Yellow Poplar Lumber Co.* 74 C. C. A. 331, 143 Fed. 204, 205; *Carson v. Combe*, 29 C. C. A. 660, 52 U. S. App. 622, 86 Fed. 210; *Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789. But not when the rights of parties can only be made apparent upon full proof. *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 502; *Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789.

Thus, where the question is one of law, which determines the ultimate rights of the parties (*Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501); or where in granting the interlocutory injunction the whole merits of the case are involved, or when it should appear that the bill had no equity to support it (*Smith v. Vulcan Iron Works*, 165 U. S. 525, 41 L. ed. 812, 17 Sup. Ct. Rep. 407); or under similar conditions shown in the cases above cited, the court will dispose of the case on its merits, though coming up under section 7 of the act. Where, however, the record is insufficient or incomplete (*Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789), as where there is no full proof of the facts and the rights of the parties are not made to fully appear, then the court will only consider whether the interlocutory order was providently granted (*Ibid.*; *Knoxville v. Africa*, *supra*; *Thompson v. Nelson*, 18 C. C. A. 137, 37 U. S. App. 478, 71

Fed. 339). As to forms of petition for appeal and notice and of such other procedure as is necessary to perfect the appeal, formulas will be hereafter given, as each step of the procedure is discussed.

Appeal from Interlocutory Decree Appointing Receivers.

An appeal lies from an interlocutory order appointing a receiver, though the order was made on an *ex parte* hearing. *Joseph Dry Goods Co. v. Hecht*, 57 C. C. A. 64, 120 Fed. 760; *Pacific Northwest Packing Co. v. Allen*, 48 C. C. A. 521, 109 Fed. 515; see *Heinze v. Butte & B. Consol. Min. Co.* 46 C. C. A. 219, 107 Fed. 166; see *Root v. Mills*, 94 C. C. A. 174, 168 Fed. 688, construing the amendment to section 1906 as to the words "a hearing in equity."

CHAPTER XCVIII.

FINAL DECREES AS A BASIS FOR APPEALS.

With the exception created by the seventh section of the act of 1891, the general rule, without question, is that to authorize an appeal, the decree must be *final* as to all matters within the pleadings. *Obert v. Marquet*, 99 C. C. A. 60, 175 Fed. 50, and cases cited; *Wilson v. Smith*, 61 C. C. A. 446, 126 Fed. 919; *Mordecai v. Lindsay*, 19 How. 201, 15 L. ed. 624; *Robinson v. Wilmington*, 9 C. C. A. 84, 8 U. S. App. 541, 60 Fed. 471; *Craighead v. Wilson*, 18 How. 201, 15 L. ed. 333; *Green v. Fisk*, 103 U. S. 519, 26 L. ed. 486; *McLish v. Roff*, 141 U. S. 661, 25 L. ed. 893, 12 Sup. Ct. Rep. 118. (See "Final Decrees.") By section 6 of the act of 1891 it is provided that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal *final* decisions in the circuit and district courts, in all cases other than those provided in section 5, or otherwise provided by law, as in remanding a case to a State court, etc. *Robinson v. Belt*, 5 C. C. A. 521, 12 U. S. App. 431, 56 Fed. 328; *Hooven, O. & R. Co. v. Featherstone's Sons*, 49 C. C. A. 229, 111 Fed. 81; *McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118; *Bowker v. United States*, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802.

In section 5 of the act of 1891, providing for appeals to the Supreme Court direct, the word "final" is not used, but in *McLish v. Roff*, *supra*, it is held that appeals under this section can be taken only after final judgment entered, when the party must elect whether he will take his writ of error or appeal to the Supreme Court, or to the court of appeals upon the whole case. *McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118; *Bowker v. United States*, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802; *United States v. John*, 155 U. S. 114, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 961; *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 263; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465, 466. So a

writ of error to review the judgments of the circuit court of appeals by the Supreme Court,—the decree must be *final*. MacLeod v. Graven, 24 C. C. A. 449, 47 U. S. App. 573, 79 Fed. 84, 85; Morris v. Dunbar, 79 C. C. A. 226, 147 Fed. 406; Beamer v. Werner, 86 C. C. A. 289, 159 Fed. 99.

What is a Final Decree?

I have already defined a final decree under "Decrees," reference to which, and authorities there cited, is here made. We saw that whether it is final depends on its essence, and not on its form, or what it is called (Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860), and the Supreme Court has been liberal, and not technical, in construing the words "final decree." Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 557. We saw, again, that to be final the *controversy* must be settled (Hohorst v. Hamburg-American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; French v. Shoemaker, 12 Wall. 98, 20 L. ed. 271); and the case must be left in such condition that if there be an affirmance by the appellate court, the court below will have nothing to do but execute the judgment (West v. East Coast Cedar Co. 51 C. C. A. 416, 113 Fed. 743; Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4, 5; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; Stevens v. Nave-McCord Mercantile Co. 80 C. C. A. 25, 150 Fed. 71; National Bank v. Smith, 156 U. S. 333, 39 L. ed. 442, 15 Sup. Ct. Rep. 358; Meagher v. Minnesota Thresher Mfg. Co. 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; Winthrop Iron Co. v. Meeker, 109 U. S. 183, 27 L. ed. 899, 3 Sup. Ct. Rep. 111; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 546, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Kemp v. National Bank, 48 C. C. A. 213, 109 Fed. 50; Grant v. Phoenix Mut. L. Ins. Co. 106 U. S. 431, 27 L. ed. 238, 1 Sup. Ct. Rep. 414; Defer v. DeMay, 168 U. S. 704, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941); and finally must be determined by Federal, and not State law (Menge v. Warriener, 57 C. C. A. 432, 120 Fed. 816, 817 and cases cited).

At common law it is not difficult to determine when a judgment is final, but difficulties arise in determining when a decree in equity is final when tested by the rules above given. The various forms it assumes, because of its flexibility, have

given rise to much conflict of authority in determining a decree to be final and appealable. *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 788, and cases cited.

Of course, when the decree determines the litigation, and leaves nothing to be done but to enforce it by execution or order, we can have no difficulty in determining its character (*West v. East Coast Cedar Co.* 51 C. C. A. 416, 113 Fed. 743); but where something is to be done before the decree can be carried into execution, then arises the question whether it can be the basis of an appeal. It would not be profitable to follow the labyrinth of cases, and I can do no more than state some of the conditions under which a decree has been held final, though other proceedings were necessary to make it effective.

First. It seems a decree may be final, though the court gives parties a right to apply for modifications and directions (*Stovall v. Banks*, 10 Wall. 586, 19 L. ed. 1037; *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552, 557; *Re Farmers' Loan & T. Co.* 129 U. S. 213, 32 L. ed. 657, 9 Sup. Ct. Rep. 265); or though the bill be retained after the decree to adjust by further decree the accounts between the parties pursuant to the decree passed (*Thompson v. Dean* [*Dean v. Nelson*] 7 Wall. 346, 19 L. ed. 95; *Forgay v. Conrad*, 6 How. 204, 12 L. ed. 405; *Bray v. Staples*, 103 C. C. A. 451, 180 Fed. 330, and cases cited).

Second. A decree may be final which determines the issues, but holds the fund for distribution. *Bank of Lewisburg v. Sheffey*, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755; *Ex parte Norton*, 108 U. S. 242, 27 L. ed. 711, 2 Sup. Ct. Rep. 490; *Andrews v. National Foundry & Pipe Works*, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 518; *Washington & A. R. Co. v. Bradley* (*Washington & A. R. Co. v. Washington*), 7 Wall. 577, 19 L. ed. 274. But in *Bank of Lewisburg v. Sheffey*, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755, it is said that it must be the distribution as decreed, and not held, pending consideration how to be distributed.

Third. A decree may be final though referred to a master (*Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 785, and cases cited; *Hill v. Chicago & E. R. Co.* 140 U. S. 54, 35 L. ed. 332, 11 Sup. Ct. Rep. 690), but the reference must be as to some matter in aid of the execution, and not affecting the substance of the decree itself. *Keystone Manganese & Iron Co. v.*

Martin, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32, and authorities cited; Grant v. East & West R. Co. 1 C. C. A. 681, 2 U. S. App. 182, 50 Fed. 797. Thus if the decree be made fixing the rights and liabilities of the parties, and the reference to the master is only for a ministerial purpose, and not for further proceedings contemplated by the court, then the decree is appealable, though referred to a master. McGourkey v. Toledo & O. C. R. Co. 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; West v. East Coast Cedar Co. 51 C. C. A. 416; Latta v. Kilbourn, 150 U. S. 540, 37 L. ed. 1175, 14 Sup. Ct. Rep. 201, 113 Fed. 743.

To illustrate: If the reference to a master is to state an account upon which a decree is to be entered, then it is not final. Chase v. Driver, 34 C. C. A. 668, 92 Fed. 784; Perkins v. Fourniquet, 6 How. 208, 12 L. ed. 407; Pulliam v. Christian, 6 How. 211, 212, 12 L. ed. 408, 409; Craighead v. Wilson, 18 How. 201, 15 L. ed. 333; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; Lodge v. Twell, 135 U. S. 235, 34 L. ed. 154, 10 Sup. Ct. Rep. 745; Moran v. Hagerman, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 503; California Nat. Bank v. Stateler, 171 U. S. 449, 43 L. ed. 234, 19 Sup. Ct. Rep. 6; Parsons v. Robinson, 122 U. S. 114, 30 L. ed. 1122, 7 Sup. Ct. Rep. 1153; Burlington, C. R. & N. R. Co. v. Simmons, 123 U. S. 56, 31 L. ed. 74, 8 Sup. Ct. Rep. 58; Southern R. Co. v. Postal Teleg. Cable Co. 179 U. S. 643, 45 L. ed. 356, 21 Sup. Ct. Rep. 249; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 567; Mercantile Trust Co. v. Chicago, P. & St. L. R. Co. 60 C. C. A. 651, 123 Fed. 391. But if an accounting is not asked in the bill, and the court should order an accounting simply in execution of the decree, then it is final. Ibid.; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; West v. East Coast Cedar Co. 51 C. C. A. 416, 113 Fed. 743; Grant v. East & W. R. Co. 1 C. C. A. 681, 2 U. S. App. 182, 50 Fed. 797; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 784, 785. It appears, then, in all of these cases, that if the rights and liabilities of the parties are fixed by the decree, and the further act to be done, or ordered to be done, is only in aid of the execution of the decree, then the decree is final; but if the act to be done or contemplated is intended to be used in any way to determine judicially the rights or liabilities of

parties, then the decree is not final. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170.

Fourth. A decree may be final that completely determines the right of some of the parties to a suit, who are not jointly liable with those against whom the suit is retained, and which completely determines a collateral matter distinct from the general subject of litigation. Illustrative cases: *Potter v. Beal*, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 132; *Hooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 111 Fed. 81; *Kemp v. National Bank*, 48 C. C. A. 213, 109 Fed. 48; *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 839, 840, and cases cited. *Hill v. Chicago & E. R. Co.* 140 U. S. 54, 35 L. ed. 332, 11 Sup. Ct. Rep. 690; *Sanders v. Bluefield Waterworks & Improv. Co.* 45 C. C. A. 475, 106 Fed. 587; *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552; *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 324; *Tuttle v. Claffin*, 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122; *Stewart v. Masterson*, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 682. But see *Frow v. De La Vega*, 15 Wall. 554, 21 L. ed. 61; *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; *Baker v. Old Nat. Bank*, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed. 450; *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 656, 17 L. ed. 673; *Internal Improv. Fund v. Greenough*, 105 U. S. 531, 26 L. ed. 1159.

Judgments Not Final and Appealable.

A decree on condition is not a final decree (*Stratton v. Dewey*, 24 C. C. A. 435, 41 U. S. App. 741, 79 Fed. 32); nor an order dismissing a defendant in a joint obligation (*Beck & P. Lithographing Co. v. Wacker & B. Brewing & Malting Co.* 26 C. C. A. 11, 46 U. S. App. 486, 76 Fed. 10; *Frow v. De La Vega*, 15 Wall. 554, 21 L. ed. 61; *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; *Gay v. Vereen*, 75 C. C. A. 667, 144 Fed. 839; *Baker v. Old Nat. Bank*, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed. 450; *Memphis Keeley Institute v. Leslie E. Keeley Co.* 144 Fed. 628); nor when default entered against one defendant jointly obligated, while cause pending as to others (*Frow*

v. De La Vega, 15 Wall. 554, 21 L. ed. 61); nor an order denying an intervention (*Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Buel v. Farmers' Loan & T. Co.* 44 C. C. A. 213, 104 Fed. 839; see *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 664; *Iron R. Co. v. Toledo, D. & B. R. Co.* 10 C. C. A. 319, 18 U. S. App. 479, 62 Fed. 166); nor while petition for rehearing is pending (*Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4, and authorities); or motion for new trial (*Kingman & Co. v. Western Mfg. Co.* 170 U. S. 680, 42 L. ed. 1194, 18 Sup. Ct. Rep. 786; in *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 810); nor judgments remanding causes to State Courts (*Joy v. Adelbert College*, 146 U. S. 355, 36 L. ed. 1003, 13 Sup. Ct. Rep. 186; *Bender v. Pennsylvania Co.* 148 U. S. 502, 37 L. ed. 537, 13 Sup. Ct. Rep. 640; *Illinois C. R. Co. v. Brown*, 156 U. S. 386, 39 L. ed. 461, 15 Sup. Ct. Rep. 656; *Chicago, St. P. M. & O. R. Co. v. Roberts*, 141 U. S. 694, 35 L. ed. 905, 12 Sup. Ct. Rep. 123); nor when referred to a master whose functions as to the matter of reference are judicial, and not ministerial. *Moran v. Hagerman*, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 503, and authorities.

Illustrative cases declaring judgments not final: *National Bank v. Smith*, 156 U. S. 330, 39 L. ed. 441, 15 Sup. Ct. Rep. 358; *Latta v. Kilbourn*, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; *Louisiana Nat. Bank v. Whitney*, 121 U. S. 285, 30 L. ed. 962, 7 Sup. Ct. Rep. 897; *Luxton v. North River Bridge Co.* 147 U. S. 341, 37 L. ed. 195, 13 Sup. Ct. Rep. 356; *McGourkey v. Toledo & O. R. Co.* 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; *Union Mut. L. Ins. Co. v. Kirchoff*, 160 U. S. 378, 40 L. ed. 463, 16 Sup. Ct. Rep. 318; *Lodge v. Twell*, 135 U. S. 235, 34 L. ed. 154, 10 Sup. Ct. Rep. 745; *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 264, 37 L. ed. 444, 13 Sup. Ct. Rep. 590; *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 610, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; *Winters v. Ethell*, 132 U. S. 209, 33 L. ed. 339, 10 Sup. Ct. Rep. 56; *Parsons v. Robinson*, 122 U. S. 115, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1153; *New York Security & T. Co. v. Illinois Transfer R. Co.* 44 C. C. A. 161, 104 Fed. 710; *Baker v. Old Nat. Bank*, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed.

449; Florida Constr. Co. v. Young, 8 C. C. A. 231, 11 U. S. App. 683, 59 Fed. 722; Dufour v. Lang, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 916.

Judgments for Costs.

As a general rule, judgments for costs alone cannot be appealed from. Glendale Elastic Fabrics Co. v. Smith, 100 U. S. 112, 25 L. ed. 547; Russell v. Farley, 105 U. S. 437, 26 L. ed. 1061; Burns v. Rosenstein, 135 U. S. 456, 34 L. ed. 195, 10 Sup. Ct. Rep. 817; see The City of Augusta, 25 C. C. A. 430, 50 U. S. App. 39, 80 Fed. 304; Scatcherd v. Love, 91 C. C. A. 639, 166 Fed. 54; Blassengame v. Boyd, 101 C. C. A. 129, 178 Fed. 5, and cases cited. Ibid. But the courts recognize exceptions to the rule (Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157); as where the judgment is on the merits and the question of costs arises. See also Re Michigan C. R. Co. 59 C. C. A. 643, 124 Fed. 727; Kell v. Trenchard, 76 C. C. A. 611, 146 Fed. 245; Corn Products Ref. Co. v. Chicago Real Estate Loan & T. Co. 107 C. C. A. 283, 185 Fed. 63; Snyder v. McCarthy, 116 C. C. A. 390, 197 Fed. 166; Motion Picture Patents Co. v. Steiner, 119 C. C. A. 401, 201 Fed. 63.

Judgments by Consent.

The old rule that decrees by consent cannot be appealed from does not always prevail in the United States courts; yet the court will not consider in such cases any error which in law is waived by the consent. Eustis v. Henrietta, 20 C. C. A. 537, 41 U. S. App. 182, 74 Fed. 578; Pacific R. Co. v. Ketchum, 101 U. S. 289-296, 25 L. ed. 932-935. See Kaw Valley Drainage Dist. v. Union P. R. Co. 90 C. C. A. 320, 163 Fed. 836, and cases cited; United States v. Babbitt, 104 U. S. 768, 26 L. ed. 922.

It has been held that parties accepting benefits under a decree cannot attack it (Albright v. Oyster, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644), and in McCafferty v. Celluloid Co. 43 C. C. A. 540, 61 U. S. App. 394, 104 Fed. 305, it was held that a party stipulating that a decree in a pending suit shall be entered upon conditions to be fulfilled, and the decree being entered in pursuance thereof, errors cannot be assigned. Nashville C. & St. L. R. Co. v. United States, 113 U. S. 261, 28 L. ed. 971, 5 Sup. Ct. Rep. 460.

CHAPTER XCIX.

APPEALS, WHERE TAKEN.

From the District Court to Supreme Court Direct.

We have seen that the act of 1891 distributes the appellate jurisdiction of the national judicial system between the Supreme Court and the circuit court of appeals, and has established by designated classes the cases in which each of the two courts shall respectively have jurisdiction. I will now discuss appeals from the circuit courts to the Supreme Court direct. This jurisdiction is based on three classes of cases.

First. Cases in which the jurisdiction of the district court is challenged directly in the suit in which a final judgment has been entered, in which case the judge must certify only the question of jurisdiction for decision. *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; *Bowker v. United States*, 186 U. S. 135, 46 L. ed. 1090, 22 Sup. Ct. Rep. 802; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 96, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Hennessy v. Richardson Drug Co.* 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 198; *Crawford v. McCarthy*, 78 C. C. A. 356, 148 Fed. 198; *Davis v. Cleveland, C. C. & St. L. R. Co.* 84 C. C. A. 453, 156 Fed. 776, 777; *United States ex rel. Mudsill Min. Co. v. Swan*, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647; *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 533; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Chappell v. United States*, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397; *Kentucky State Bd. of Control v. Lewis*, 100 C. C. A. 208, 176 Fed. 556. See *Bien v. Robinson*, 208

U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; *Empire State-Idaho Min. & Developing Co. v. Henley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 451 (where other questions involved prevented a direct appeal or permitted an appeal to either the circuit or Supreme Court). See also *Kentucky State Bd. of Control v. Lewis*, 100 C. C. A. 208, 176 Fed. 556; *A. J. Phillips Co. v. Grand Trunk Western R. Co.* 115 C. C. A. 94, 195 Fed. 12; *Railroad Commission v. Morgan's L. & T. R. & S. S. Co.* 115 C. C. A. 127, 195 Fed. 66; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333, 182 Fed. 625.

Second. Cases involving the construction or application of the Constitution of the United States. *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 468, 48 L. ed. 752, 24 Sup. Ct. Rep. 489; *Sloan v. United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570; *Cummings v. Chicago*, 188 U. S. 411, 47 L. ed. 527, 23 Sup. Ct. Rep. 472; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449. A mere construction of an act of Congress is not embraced in statute. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

Third. Cases in which the constitutionality of a law of the United States, or the validity of a treaty, is in issue, or when the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States (*Re Marmo*, 138 Fed. 201; *Mitchell v. Furman*, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318; see *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 451, 452; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Field v. Barber Asphalt Paving Co.* 194 S. Eq.—41.

U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Pike's Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 216, 47 L. ed. 779, 23 Sup. Ct. Rep. 498; *Owensboro v. Owensboro Water Works Co.* 53 C. C. A. 146, 115 Fed. 318); or power of Congress over navigable waters (*Cummings v. Chicago*, 188 U. S. 410-431, 47 L. ed. 525-531, 23 Sup. Ct. Rep. 472); or arising under a treaty (*Mitchell v. Furman*, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430); or a right to vote for a member of Congress (*Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17). See *Railroad Commission v. Morgan's L. & T. R. & S. S. Co.* 115 C. C. A. 127, 195 Fed. 66; *Paducah v. East Tennessee Teleph. Co.* 106 C. C. A. 333, 182 Fed. 625.

The direct appeal to the Supreme Court, provided by U. S. Rev. Stat. secs. 652, 693, upon a certificate of dissent, has not been referred to in the act of 1891, and was declared repealed in *The Habana*, 175 U. S. 684, 44 L. ed. 322, 20 Sup. Ct. Rep. 290, and *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207. Again, by section 16 of the interstate commerce act of 1887, 24 Stat. at L. 379, chap. 104, amended in 25 Stat. at L. 855, chap. 382 (Comp. Stat. 1913, sec. 8584), either party may appeal direct to the Supreme Court if the matter in dispute exceeds two thousand dollars, and the appeal is taken in twenty days, but in view of the decision in *The Habana*, 175 U. S. 684, 685, 44 L. ed. 322, 323, 20 Sup. Ct. Rep. 290, this provision has been repealed, and there is now no direct appeal from the circuit to the Supreme Court except as stated in the act of 1891. *National Exch. Bank v. Peters*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767. See *Interstate Commerce Commission v. Baird*, 194 U. S. 26, 48 L. ed. 862, 24 Sup. Ct. Rep. 563, construing act 1903, sec. 3, providing for direct appeal to the Supreme Court in proceedings brought by the Interstate Commerce Commission.

I will now take up the cases in which a direct appeal can be taken to the Supreme Court, in their order.

First. In any case in which the jurisdiction of the circuit court is in issue, in which case the question of jurisdiction alone must be certified to the Supreme Court by the judge below, and the Supreme Court has exclusive jurisdiction. *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct.

Rep. 526; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Crawford v. McCarthy, 78 C. C. A. 356, 148 Fed. 200 and cases cited. Halpin v. Amerman, 70 C. C. A. 462, 138 Fed. 548; Alton Water Co. v. Brown, 92 C. C. A. 598, 166 Fed. 840-842. These cases limit the jurisdiction to the jurisdiction as a Federal court, excluding questions of jurisdiction applicable to State and Federal courts. Bowker v. United States, 186 U. S. 135, 46 L. ed. 1090, 22 Sup. Ct. Rep. 802; Scully v. Bird, 209 U. S. 485, 52 L. ed. 901, 28 Sup. Ct. Rep. 597; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208. See Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Boston & M. R. Co. v. Gokey, 79 C. C. A. 64, 149 Fed. 42, 9 A. & E. Ann. Cas. 384; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 112 C. C. A. 637, 192 Fed. 475-478, and cases cited.

In *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526, the court says that in order to maintain jurisdiction in the Supreme Court in this class of cases, the record must distinctly show, without equivocation, that the court below sends up for consideration the single and definite question of jurisdiction. *Waterford v. Elson*, 78 C. C. A. 675, 149 Fed. 93; *Arkansas v. Schillerholz*, 179 U. S. 600, 45 L. ed. 336, 21 Sup. Ct. Rep. 229; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Chappell v. United States*, 160 U. S. 499-507, 40 L. ed. 510-512, 16 Sup. Ct. Rep. 397; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Cosmopolitan Min. Co. v. Walsh*, 183 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93. See *Giles v. Harris*, 189 U. S. 490, 47 L. ed. 913, 23 Sup. Ct. Rep. 639. There must be no mere suggestion that the jurisdiction was in issue, and no other question can be certified with it. *Davis v. Geissler*, 162 U. S. 291, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; *Van Wagenen v. Sewall*, 160 U. S. 373, 40 L. ed. 461, 16 Sup. Ct. Rep. 370; *Hennessy v. Richardson Drug Co.* 189 U. S. 25,

47 L. ed. 697, 23 Sup. Ct. Rep. 532. But it seems, where a case is taken direct on ground of jurisdiction alone, and thus certified, the Supreme Court may pass upon a question of fact where the decision below is wrong, and upon this set aside the judgment of the court below. *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 256, 53 L. ed. 787, 29 Sup. Ct. Rep. 445. Questions for direct appeal must be real and substantial. *Lampasas v. Bell*, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368.

Grounds of Certification.

The absence of jurisdiction may be certified on the want of service of process. *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; *Remington v. Central P. R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; *Kendall v. American Automatic Loom Co.* 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, s. c. 84 C. C. A. 453, 156 Fed. 775; see *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196-201, and cases cited; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 246, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; *Boston & M. R. Co. v. Gokey*, 79 C. C. A. 64, 149 Fed. 44. The cases which limit the jurisdiction of the Federal court as a Federal court apply to questions arising after a valid service is made, and not to the question as to whether service has been made and jurisdiction acquired. *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740. Such certificate may also issue when the cause is not properly removed from the State court (*Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; see *Kansas City North Western R. Co. v. Zimmerman*, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730); or when party sues as assignee and the assignor could not have sued (*Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 261); or any other ground upon which the jurisdiction of the court below has been decisively attacked, and the same

has been overruled, or when case dismissed on motion for want of jurisdiction (Davis & R. Bldg. & Mfg. Co. v. Barber, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465, 466; The Alliance, 17 C. C. A. 124, 44 U. S. App. 52, 70 Fed. 274; Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532); but not when the question has been made that there is no jurisdiction in equity because of an adequate remedy at law (United States ex rel. Mudsill Min. Co. v. Swan, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Kansas City North Western R. Co. v. Zimmerman, 210 U. S. 338, 52 L. ed. 1086, 28 Sup. Ct. Rep. 730).

Conditions Under Which the Issue is Presented and Decided.

First. To present the issue, the record must show the jurisdiction in issue, and that a final judgment was entered in the case in the district court (Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118), in favor of the defendant, thus disposing of the case. In such case the plaintiff should have the case certified to the Supreme Court, direct. United States v. Jahn, 155 U. S. 114, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; Bowker v. United States, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658-660; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610.

Second. If jurisdiction is in issue, and the jurisdiction sustained, and judgment on merits is in favor of the defendant, the plaintiff should appeal the case to the circuit court of appeals, and if jurisdiction arises, it may be certified to the Supreme Court. New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658-660.

Third. When the question of jurisdiction was directly involved, but the judgment of the whole case was in favor of the

plaintiff, the defendant may go direct to the Supreme Court on the question of jurisdiction, or go to the court of appeals on the merits, and have that court to certify the question of jurisdiction. *McLish v. Roff*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 114, 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 965; *Carter v. Roberts*, 177 U. S. 500, 44 L. ed. 863, 20 Sup. Ct. Rep. 713; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 667.

Fourth. If plaintiff recovers in part, but is dissatisfied, and the jurisdiction has been put in issue and sustained, the defendant can go direct to the Supreme Court on the jurisdictional question, while the plaintiff may appeal to the circuit court of appeals on the merits. *United States v. Jahn*, 155 U. S. 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *North-ern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482. "The same observations are applicable where the the plaintiff objects to the jurisdiction and is, or both parties are dissatisfied with the judgment on its merits." *Evans-Snider-Buel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 660. But where there are separate appeals of this character, the circuit court of appeals will continue the case until the Supreme Court acts on the question of jurisdiction. *Pullman's Palace Car Co. v. Central Transp. Co.* 22 C. C. A. 246, 39 U. S. App. 307, 76 Fed. 401, S. C. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

I repeat, then, that when the jurisdiction of the district court is put in issue with other issues on the merits, there is given to the losing party an election between the Supreme Court and the circuit court of appeals; that is, he may go direct to the Supreme Court on the question of jurisdiction, or he may take the whole case on its merits to the circuit court of appeals (*Ibid.*; *Robinson v. Caldwell*, 165 U. S. 361, 41 L. ed. 746, 17 Sup. Ct. Rep. 343; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129-132); and the circuit court of appeals may determine the question of jurisdiction in passing upon the whole case (*Ibid.*; see chapter 106,

“May Circuit Court of Appeals Determine Jurisdictional Questions”); or the court of appeals may certify the question of jurisdiction (*Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 898).

Again, if the jurisdiction is sustained, but the judgment is rendered in favor of the defendant on the merits, the plaintiff who has sustained the jurisdiction must appeal on the merits to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it for instruction or decide it. *Ibid.*; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769.

Again, when the jurisdiction is sustained, but the plaintiff has a grievance as to the extent of his recovery, upon which account he desires to appeal, the plaintiff may appeal to the circuit court of appeals on the merits; or if the defendant has appealed, he may by cross appeal have the case reviewed as to his cause of complaint; or if the defendant has taken the case direct to the Supreme Court, on the question of jurisdiction, the plaintiff may appeal to the circuit court of appeals on the merits, but in this case the circuit court of appeals will suspend the hearing until the Supreme Court has determined the question of jurisdiction. *United States v. Jahn*, 155 U. S. 114, 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39, and authorities above cited.

Can Same Party Sue Out Two Appeals.

The question has arisen whether the *same* party can sue out two appeals, one to the Supreme Court on jurisdiction, and the other to the circuit court of appeals on the merits. It was clearly decided in *Pullman's Palace Car Co. v. Central Transp. Co.* 22 C. C. A. 246, 39 U. S. App. 307, 76 Fed. 402, that he could, but that he cannot is clearly inferred from the language of the court in *McLish v. Roff*, 141 U. S. 665, 666, 35 L. ed. 894, 895, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 113, 39 L. ed. 89, 15 Sup. Ct. Rep. 39; *Carter v. Roberts*, 177 U. S. 499, 44 L. ed. 862, 20 Sup. Ct. Rep. 713; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup.

Ct. Rep. 343; Columbus Constr. Co. v. Crane Co. 174 U. S. 601, 43 L. ed. 1103, 19 Sup. Ct. Rep. 721; Union & Planters' Bank v. Memphis, 189 U. S. 74, 47 L. ed. 714, 23 Sup. Ct. Rep. 604. However, it is said in Lockman v. Lang, 132 Fed. 1, that the practice of taking an appeal and writ of error to review the same adjudication is not only permissible, but commendable when counsel have just reason to doubt which is the proper proceeding.

Certificate a Prerequisite.

The first clause of section 5, act of 1891, requires, in any case in which the jurisdiction of the court is involved, the question of jurisdiction alone shall be *certified* to the Supreme Court by the court below. Some form of certificate under this clause is essential to the appeal. It must not only appear of record that the question of jurisdiction was involved, but that question, and that alone, must be certified. If there be other questions mixed with the jurisdictional one, and an appeal in general form be allowed without certifying or specifying the question of jurisdiction, the Supreme Court will dismiss the appeal. Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634, S. C. 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Davis & R. Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719; Ansbros v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Chappell v. United States, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397. See Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

In Davis & R. Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719, the appeal was dismissed because jurisdiction was not directly certified, following. Ibid.; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; Davis v. Geissler, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634; C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102. Where the decree of the circuit court

and allowance of appeal states bill was dismissed for want of jurisdiction, no separate certificate is necessary. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681. There is no question that the certificate required by the act is a prerequisite. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Moran v. Hagerman*, 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 354.

Form it May Assume.

What form may the certificate assume?

It may appear in several ways: Either by the terms of the decree and the order allowing the appeal, the record, the opinion of the court, or by separate certificate of the court below, which is the safest proceeding. *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526; *Loeb v. Columbia Twp.* 179 U. S. 483, 45 L. ed. 287, 21 Sup. Ct. Rep. 174; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; *Van Wagenen v. Sewall*, 160 U. S. 372, 40 L. ed. 461, 16 Sup. Ct. Rep. 370; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375. If in the decree it should appear that the case was dismissed for the want of jurisdiction only, and a review of the judgment generally is asked by the petition for appeal, and the only question tried below was the jurisdiction, which is clearly apparent in the decree, it has been held that the decree was a sufficient certificate (*Smith v. McKay*, 161 U. S. 357, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157-171, 54 L. ed. 708-717, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Huntington v. Laidley*, 176 U. S. 677, 44 L. ed. 634, 20 Sup. Ct. Rep. 526); but it must be understood that the court

will not search for it (Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 219, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370).

The word "certify" need not be used if there is a plain declaration that the single matter sent up is the question of jurisdiction. Ibid.; Chappell v. United States, 160 U. S. 508, 40 L. ed. 513, 16 Sup. Ct. Rep. 397. The entry of a judge, "Appeal allowed," upon a petition, was held not equivalent to a certificate. The Bayonne, 159 U. S. 693, 40 L. ed. 309, 16 Sup. Ct. Rep. 185; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Arkansas v. Schliehholz, 179 U. S. 600, 45 L. ed. 336, 21 Sup. Ct. Rep. 229. So filing an assignment of errors and allowance of an appeal is not an equivalent. As said, then, the safest method of proceeding is to apply to the court for a certificate, which should be specific in stating the question of jurisdiction. Ibid.; Carey v. Houston & T. C. R. Co. 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63.

Granted in Term.

It is absolutely necessary that this certificate should be granted during the term at which the judgment was entered (Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Re Lehigh Min. & Mfg. Co. 156 U. S. 327, 39 L. ed. 440, 15 Sup. Ct. Rep. 375; The Bayonne, 159 U. S. 693, 40 L. ed. 309, 14 Sup. Ct. Rep. 185; Chamberlin v. Peoria, D. & E. R. Co. 55 C. C. A. 54, 118 Fed. 32), and that the judgment in which the certificate is granted is *final* (Gates v. Bucki, 53 Fed. 961; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Carey v. Houston & T. C. R. Co. 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39); and against the appellant. (Ibid.) It is said in Pullman's Palace Car Co. v.

Central Transp. Co. 71 Fed. 809, that this right of appeal is absolute, and cannot be controlled by the circuit judge to either allow or disallow; the Supreme Court alone determines the right. *Dudley v. Lake County*, 43 C. C. A. 184, 103 Fed. 209.

FORM OF CERTIFICATE.

A. B. } vs. } C. D. }	In the United States District Court for the.....District of....., sitting at.....
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This cause came on to be heard upon the application for an injunction as prayed in the bill of complaint, and for the appointment of a receiver, etc. (or whatever was the purpose of the bill).

The bill alleged, etc.

The defendant denied the amount in issue exceeded the sum of two thousand dollars, etc. (or state so much of the bill as shows the question involved).

Now, therefore, it is certified that the question of the jurisdiction of this court upon the grounds heretofore stated, to wit: (state the issue) was the issue upon which the case was decided, I having found that (conclusion of court on the issue) it was the duty of the court to dismiss the bill, which was accordingly done (or whatever action was taken); and I further certify that it is the only question of law upon the pleading and process for the decision of the Supreme Court of the United States; that the certificate was granted at the term in which the judgment in the cause was entered.

W. R.,
United States Circuit Judge.

See *Colvin v. Jacksonville*, 158 U. S. 458, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866, for certificate held sufficient.

This certificate applies where the question of jurisdiction is decided for the defendant and disposes of the case, and it may be signed by the district judge. *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

CHAPTER C.

APPEALS UNDER CLAUSES 4, 5, AND 6, OF SECTION 5, ACT OF 1891.

We have so far discussed appeals from the circuit court to the Supreme Court under clause 1 of section 5, act of 1891. Under clauses 4, 5, and 6, of section 5, act of 1891, it is provided that a direct appeal may be taken from the circuit court to the Supreme Court of the United States, when the construction or application of the Constitution of the United States is involved, or the constitutionality of any law of the United States, or the construction or validity of any treaty is drawn in question; or in cases in which the constitution or law of any State is claimed to be in contravention of the Constitution of the United States. The provisions permit, when any of the enumerated Federal questions arise and are the *controlling* questions in the determination of the case, an appeal direct to the Supreme Court from the circuit court, although all other questions were open for determination (see appendix for act of March 3rd, 1891). *Carey v. Houston & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 619, 620, 44 L. ed. 912, 913, 20 Sup. Ct. Rep. 822. And if the jurisdiction of the circuit court rests on the ground that the suit arises under any of these clauses, then the jurisdiction of the Supreme Court is exclusive. *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 728; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 407, 48 L. ed. 499, 24 Sup. Ct. Rep. 376; *Wright v. MacFarlane*, 58 C. C. A. 570,

122 Fed. 770; *Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 783; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Boston & M. R. Co. v. Gokey*, 79 C. C. A. 64, 149 Fed. 44, 9 A. & E. Ann. Cas. 384; *Waterford v. Elson*, 78 C. C. A. 675, 149 Fed. 91; *Halpin v. Amerman*, 70 C. C. A. 462, 138 Fed. 548; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196. But if the jurisdiction of the circuit court attaches on ground of diversity, and afterwards issues are raised under these clauses, then you may go direct to the Supreme Court, or to the circuit court of appeals. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 407, 408, 48 L. ed. 499, 500, 24 Sup. Ct. Rep. 376; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498. But the option is lost by taking an appeal to the circuit court of appeals. *McFadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Olds v. Herman H. Hettler Lumber Co.* 115 C. C. A. 91, 195 Fed. 9-12.

It is said in *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196, that when the jurisdiction of the circuit court is invoked solely on the ground of diversity of citizenship, two classes of cases may arise, one in which any of the questions expressed in section 5 of the act of 1891 may appear in the prosecution of the case, and another class where other questions of Federal character not expressed in section 5 may arise. In the first class of cases you may appeal direct to the Supreme Court or go to the circuit court of appeals, and in the second class you must appeal to the circuit court of appeals, and its judgment will be final, and you can therefore only reach the Supreme Court by certiorari.

But when an appeal under any of these clauses is taken, it must really and substantially appear that it involves a dispute or controversy under one or more of them, and that an issue is presented upon the determination of which the suit depends. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 619, 44 L. ed. 912, 20 Sup. Ct. Rep. 822; *Hastings v. Ames*, 15 C. C.

A. 628, 32 U. S. App. 485, 68 Fed. 728. The Federal question must be the controlling one, and real and substantial (*Carey v. Houston*, & T. C. R. Co. 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Scott v. Donald*, 165 U. S. 73, 74, 41 L. ed. 633, 634, 17 Sup. Ct. Rep. 265; *Lampasas v. Bell*, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368); and it must so appear in the record by a statement in legal and logical form, such as is required in good pleading (*Lampasas v. Bell*, 180 U. S. 283, 45 L. ed. 530, 21 Sup. Ct. Rep. 368; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Press Pub. Co. v. Monroe*, 164 U. S. 111, 41 L. ed. 369, 17 Sup. Ct. Rep. 40; *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 667).

You will notice that there is no limitation in these clauses as in the first clause, confining the investigation of the Supreme Court to question of jurisdiction alone, nor is a certificate, as under the first clause, required. *Robinson v. Caldwell*, 165 U. S. 362, 41 L. ed. 746, 17 Sup. Ct. Rep. 343. So when the Supreme Court does take jurisdiction under any or all of these three clauses, it will decide all other questions involved in the case. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 217, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; *Chappell v. United States*, 160 U. S. 509, 40 L. ed. 513, 16 Sup. Ct. Rep. 397; *Press Pub. Co. v. Monroe*, 164 U. S. 111, 41 L. ed. 369, 17 Sup. Ct. Rep. 40; *Scott v. Donald*, 165 U. S. 72, 73, 41 L. ed. 632, 634, 17 Sup. Ct. Rep. 265; *Horner v. United States*, 143 U. S. 577, 36 L. ed. 269, 12 Sup. Ct. Rep. 522.

May the Circuit Court of Appeals Determine Questions of Jurisdiction.

To emphasize the jurisdiction of the Supreme Court in cases involving causes for appeal under section 5, I will briefly discuss whether the *circuit court of appeals can determine* the question of the jurisdiction of the lower court, when properly raised; that is, in view of the act of 1891, can a circuit court of appeals ever determine the issue of the jurisdiction of the trial court in causes appealed to it, in which that issue is raised?

In *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 132, it is held that when a final judgment is rendered in the circuit or district courts of the United States, in which the issue of jurisdiction was raised below, that if the losing party should elect to take the whole case to the circuit court of appeals, it can determine the jurisdiction of the court below with the other issues of law, and fact.

In the fifth circuit, Judge Pardee, in *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 509, and cases cited, construing section 5 of the act of 1891, in the light of *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, and the *Carey Case* in 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63, decides that the question of the jurisdiction of the trial court can be considered with the other issues in the case, *Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 371; *The Presto*, 35 C. C. A. 394, 93 Fed. 522, and says that the statement that the question of jurisdiction be certified to the Supreme Court by the circuit court of appeals does not make it obligatory, but is a matter of discretion when needing instruction on the point. *United States v. Jahn*, 155 U. S. 109-114, 39 L. ed. 87-90, 15 Sup. Ct. Rep. 39; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *McGilvra v. Ross*, 90 C. C. A. 398, 164 Fed. 604, 605; *Rust v. United Water Works Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 132; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Boston & M. R. Co. v. Gokey*, 210 U. S. 155, 52 L. ed. 1002, 28 Sup. Ct. Rep. 657; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 663; *Crabtree v. Madden*, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 426; *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *King v. McLean Asylum*, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 327; *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503-508; *Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 371; *Texas & P. R. Co. v. Bloom*, 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979; *Green v. Mills*, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852.

It is apparent, then, from the cases, when the judgment of the court below is not upon the question of jurisdiction alone, but upon various issues involving the merits of the case, and an appeal has been taken on the whole case to the circuit court of appeals, that court may decide the whole case, and the question of jurisdiction must be left with that court to decide whether it is of sufficient gravity to warrant its submission to the Supreme Court. *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 401, and authorities cited.

In the second circuit it is held that when the pleadings and proof do not show diversity, the circuit court of appeals cannot determine the question. *Sun Printing & Pub. Asso. v. Edwards*, 58 C. C. A. 162, 121 Fed. 827. See, also, *United States v. Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 467; and *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 534. But if the case involves other questions on the merits, the circuit court of appeals may decide them and certify the jurisdictional question to the Supreme Court.

*Jurisdiction of Circuit Court of Appeals When Case Based on
Clauses 4, 5 and 6.*

We may now inquire if the court of appeals can take jurisdiction of cases involving grounds of appeal set forth in clauses 4, 5, and 6 of section 5 of the act of 1891, which provide for an appeal direct to the Supreme Court.

It has been decided that when cases arise which are controlled by a construction or application of the Constitution of the United States, a direct appeal lies to the Supreme Court, and if carried to the circuit court of appeals those courts may decline to take jurisdiction. *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Kentucky State Bd. of Control v. Lewis*, 100 C. C. A. 208, 176 Fed. 556. But when questions designated in these clauses are mixed with other questions in the case going to the merits, those courts may take jurisdiction and certify the constitutional question, which being answered, they may proceed to judgment, or those courts may decide the case on the merits in the first instance. *Wirgaman v. Persons*, 62 C. C. A. 63, 126 Fed. 449-455, see cases cited;

American Sugar Ref. Co. v. New Orleans, 181 U. S. 282, 45 L. ed. 862, 21 Sup. Ct. Rep. 646; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 663; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 898; *Re Can Pon*, 93 C. C. A. 635, 168 Fed. 479, 482; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Harris v. Rosenberger*, 13 L.R.A. (N.S.) 762, 76 C. C. A. 225, 145 Fed. 451; *United States v. Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 467. The circuit court of appeals may, under these conditions, certify the jurisdictional question, but is under no obligation to do so. *Weber Bros. v. Grand Lodge, F. & A. M.* 96 C. C. A. 410, 171 Fed. 840 and cases cited.

We have already seen that where jurisdiction depends on diversity of citizenship, and it turns out that the case involves the construction or application of the Constitution of the United States, or any question under the fourth, fifth, and sixth clauses of section 5 of the act of 1891, the circuit court of appeals may certify the constitutional question, or may decide the whole case. The court having jurisdiction by diversity of citizenship only, the mere fact that one or more of the constitutional questions referred to in section 5 arose subsequently would not deprive the court of appeals of jurisdiction, or justify it in declining to exercise it. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Love v. Busch*, 73 C. C. A. 545, 142 Fed. 429; *Huguley Mfg. Co. v. Galtton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Pikes Peake Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524.

In *Alton Water Co. v. Brown*, 92 C. C. A. 598, 166 Fed. 840, it is said that giving exclusive appellate jurisdiction to the Supreme Court under the act of 1891 is limited, (1) to cases which the jurisdiction of the Federal court, as such, is put in issue; (2) to an issue as to whether defendant has been served with proper process. To determine, then, where to appeal, the rule may be stated, where a constitutional question is involved, and the jurisdiction of the circuit court is original-

ly invoked upon it, the appeal must be to the Supreme Court only: the circuit court of appeals cannot decide it. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 291, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Evans-Snider-Buel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 658; *St. Clair County v. Interstate Sand & Car Transfer Co.* 49 C. C. A. 169, 110 Fed. 785 and cases cited; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, s. c. 43 C. C. A. 393, 104 Fed. 2; *Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318; *Barr v. New Brunswick*, 19 C. C. A. 71, 39 U. S. App. 187, 72 Fed. 689; *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 533; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; *Seattle v. Thompson*, 52 C. C. A. 44, 114 Fed. 96. If, however, diverse citizenship is set up as well as the constitutional question, an appeal can be taken to the circuit court of appeals, and a writ of error from its decision to the Supreme Court (*Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Wright v. MacFarlane Co.* 58 C. C. A. 570, 122 Fed. 774, 775); or direct to the Supreme Court (*Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498).

To illustrate: If the case *depends* on the construction or application of the Constitution of the United States, or a case in which a State law is claimed to be in contravention thereof, the circuit court of appeals has no jurisdiction, and the appeal must be dismissed, if the jurisdiction of the circuit court was based on the constitutional question. *Ibid.*; *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753, 754; *Chicago, M. & St. P. R. Co. v. Evans*, 7 C. C. A. 290, 19 U. S. App. 233, 58 Fed. 433; *Re Abbey Press*, 67 C. C. A. 161, 134 Fed. 55; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L.

ed. 626, 18 Sup. Ct. Rep. 223. However, as said in *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449, though there be no diversity of citizenship, and the validity of an act of Congress is in issue, if the case also involves the proper construction of an act of Congress, the jurisdiction of the Supreme Court is not exclusive (*Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Rider v. United States*, 79 C. C. A. 112, 149 Fed. 170); or where matters are involved with the constitutional question not within the exclusive jurisdiction of the Supreme Court (*Hooper v. Remmel*, 91 C. C. A. 322, 165 Fed. 338), as *where* the only and controlling question is, would the proposed acts of a municipal corporation deprive the applicant of property without due process of law (*Barr v. New Brunswick*, 19 C. C. A. 71, 39 U. S. App. 187, 72 Fed. 689; *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726); or where a city ordinance is held to discriminate against commerce (*Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498); or the case depends on the constitutionality of State statutes (*Wrightman v. Boone County*, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 437; *Wright v. MacFarlane*, 58 C. C. A. 570, 122 Fed. 773; *Illinois C. R. Co. v. Adams*, 35 C. C. A. 635, 93 Fed. 856; *Pauley Jail Bldg. & Mfg. Co. v. Crawford County*, 28 C. C. A. 579, 56 U. S. App. 53, 84 Fed. 942).

CHAPTER CL.

APPEAL TO CIRCUIT COURT OF APPEALS.

Jurisdiction.

I have incidentally discussed the jurisdiction of the circuit court of appeals under the clauses of section 5 of the act of 1891. I will now take up section 6 of that act, that provides "that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error *final* decisions of the district courts of the United States in *all* cases other than those provided for in section 5, unless otherwise provided by law, and the judgments or decrees of the circuit court of appeals shall be *final* in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, revenue laws, and in admiralty cases." Civil Code, sec. 128. Power is further granted to these courts to certify in every case within its appellate jurisdiction any question or proposition of law concerning which it desires instruction.

The Supreme Court is authorized in those cases made *final* in the circuit court of appeals, to have sent up by certiorari, or otherwise, any such case for its review and determination. It is further provided that in all cases not made final in the circuit court of appeals, the case may be taken to the Supreme Court for review on appeal or writ of error, where the matter in controversy shall exceed one thousand dollars besides costs, and one year is given within which an appeal can be taken from the circuit court of appeals to the Supreme Court.

Such is the statute fixing the jurisdiction of the circuit court of appeals, and it is seen that it is wholly appellate (Travis

County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 690), and confined to a revision of the decisions in the district courts of the United States. Its mission seems to be to settle property rights, rather than to determine constitutional questions, as it is excluded from reviewing cases arising under section 5, already discussed. It is further excluded from reviewing cases "otherwise provided for by law," and it is suggested by Mr. Curtis that this term covers—

First. Cases in which the decision of the district court is final, as where a district court remands a case to a State court.

Second. Cases where the United States Supreme Court exercises appellate revision in habeas corpus and mandamus proceedings, or any other method than by appeal or writ of error.

Third. To some exceptional revenue cases.

In *The Habana*, 175 U. S. 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290, it is said the words refer to provisions of the same, or contemporaneous acts, or subsequent acts of Congress, and do not include provisions of earlier statutes. The circuit courts of appeals have no power to review judgments of State supreme courts (*Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 50); nor judgments of the district courts of the United States by certiorari (*Travis County v. King Iron Bridge & Mfg. Co.* 34 C. C. A. 620, 92 Fed. 690; *United States ex rel. Montana Ore Purchasing Co. v. Circuit Ct.* 61 C. C. A. 314, 126 Fed. 169).

It is not necessary to pursue the provisions of the act any further to determine when equity causes may be appealed to the circuit court of appeals. The method of exclusion provided by the sixth section fixes affirmatively what cases are within the appellate jurisdiction of these courts.

Practice in Appeals and Statutes Stated.

I have already called your attention to section 11 of the act of 1891, providing that appeals under the act are to be regulated by existing statutes and rules of court, including the provision for bonds, or other security required on appeals, or writ of error, and that judges have the same power as to allowing

appeals as now belong by law to such judges and justices. - See U. S. Rev. Stat. secs. 997 to 1013 (Comp. Stat. 1913, secs. 1653-1655), relating to practice on appeal or error; see, also Rules of Supreme Court of the United States; Act of 1891 sec. 11; Northern P. R. Co. v. Amato, 1 C. C. A. 468, 1 U. S. App. 113; 49 Fed. 881; Simpson v. First Nat. Bank, 63 C. C. A. 371, 129 Fed. 258.

Time for Appealing.

If aggrieved by the decision, you may appeal at once, that is, during the term, or you have six months after the entry of the final decree to take an appeal (Act of 1891, sec. 11, note 15, 90 Fed. CLIX; Cocke v. Copenhagen, 61 C. C. A. 211, 126 Fed. 147; Condon v. Central Loan & T. Co. 20 C. C. A. 110, 36 U. S. App. 579, 73 Fed. 907; Travis County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 690; Blaffer v. New Orleans Water Supply Co. 87 C. C. A. 341, 160 Fed. 389, 390, and cases cited; Waxahachie v. Coler, 34 C. C. A. 349, 92 Fed. 284, Meyer v. Hot Springs Imp. Co. 95 C. C. A. 156, 169 Fed. 628; Born v. Schneider, 128 Fed. 179; Connecticut F. Ins. Co. v. Oldendorff, 19 C. C. A. 379, 44 U. S. App. 487, 73 Fed. 89; Hudson v. Limestone Natural Gas Co. 75 C. C. A. 678, 144 Fed. 952; Butt v. United States, 126 Fed. 794; Green v. Lynn, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 839; Noonan v. Chester Park Athletic Club Co. 35 C. C. A. 457, 93 Fed. 576; Coe v. East & W. R. Co. 29 C. C. A. 292, 52 U. S. App. 532, 85 Fed. 489; Threadgill v. Platt, 71 Fed. 3. It must not only be allowed, but must be issued within the time. Ibid.; Stevens v. Clark, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 321; Blaffen v. New Orleans Water Supply Co. 160 Fed. 391; Scarborough v. Pargoud, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877); unless in the particular character of case less time is fixed by law governing appeals and writs of error when the act was passed. Act of 1891, sec. 11. It will be noticed that section 11 of the act of 1891 only applies to appeals to the circuit court of appeals. (See Appendix.)

In appealing to the Supreme Court direct, the act of 1891 does not apply, so we must look at the law fixing the time within which the appeal to the Supreme Court must be taken, U. S.

Rev. Stat. sec. 1008 (Comp. Stat. 1913, sec. 1649), which fixes two years from the *entry* of the order, except when a disability intervenes, then the time begins from its removal. *Andrews v. Thum*, 18 C. C. A. 566, 33 U. S. App. 430, 72 Fed. 290; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840. In computing the time the day on which the decree is entered is excluded, and when an application for rehearing is filed and entertained, then time begins when the application is overruled. *Andrews v. Thum*, 18 C. C. A. 566, 33 U. S. App. 430, 72 Fed. 290; *S. C.* 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 149; *Louisville Trust Co. v. Stockton*, 18 C. C. A. 408, 41 U. S. App. 579, 72 Fed. 1; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Alexander v. United States*, 6 C. C. A. 602, 15 U. S. App. 158, 57 Fed. 828; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 678, 42 L. ed. 1193, 18 Sup. Ct. Rep. 786; *Texas & P. R. Co. v. Murphy*, 111 U. S. 489, 28 L. ed. 493, 4 Sup. Ct. Rep. 497; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; See *Marks v. Northern P. R. Co.* 22 C. C. A. 630, 44 U. S. App. 714, 76 Fed. 941; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840. If the last day for an appeal falls on Sunday, or a *dies non* you had better perfect the appeal the day before. *Johnson v. Meyers*, 4 C. C. A. 399, 12 U. S. App. 220, 54 Fed. 417; *Meyer v. Hot Springs Imp. Co.* 95 C. C. A. 156, 169 Fed. 629.

When the appeal is filed after six months under the act of 1891, it will be dismissed. *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *Coulliette v. Thomason*, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787; *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753. The court has no jurisdiction of an appeal filed after the time. *Union P. R. Co. v. Colorado Eastern R. Co.* 4 C. C. A. 161, 12 U. S. App. 110, 54 Fed. 22; *White v. Iowa Nat. Bank*, 17 C. C. A. 621, 36 U. S. App. 260, 71 Fed. 97; *Condon v. Central Loan & T. Co.* 20 C. C. A. 110, 36 U. S. App. 579, 73 Fed. 907. See *J. D. Randall Co. v. Foglesong Mach. Co.* 119 C. C. A. 185, 200 Fed. 741, where the judge could not be reached, subsequently made *nunc pro tunc* order held good.

When is Appeal Said to Be Taken.

The question arises, when is the appeal said to be "taken" so as to save the bar? The appeal is taken when *allowed* by the court (*Credit Co. v. Arkansas C. R. Co.* 128 U. S. 261, 32 L. ed. 449, 9 Sup. Ct. Rep. 107; See "Allowance of Appeal"); and the filing of the bond and issuance of citation after six months will not bar the appeal, as neither requirement is jurisdictional, that is to say, the allowance of the appeal in six months as stated is sufficient, as neither the filing of the bond or issuing citation is jurisdictional. *Noonan v. Chester Park Athletic Club Co.* 35 C. C. A. 457, 93 Fed. 576; *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851. See *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; *J. D. Randall Co. v. Foglesong Mach. Co.* 119 C. C. A. 185, 200 Fed. 743 and cases cited; *Pooler v. Hyne*, 120 C. C. A. 408, 202 Fed. 194.

There may be, because of separable controversies created by the bill, cross bills or interventions, several final appealable decrees, and the time for appealing will date from the entry of the particular decree. In discussing "cross" appeals, it will be seen that they are governed by the same time limit.

Notice of Appeal.

Having seen the time within which one must act who desires an appeal, the next step is to give "notice of appeal," and have the amount of the bond fixed. You may give this notice of appeal in open court, or within the six months allowed. If notice is given in open court when the case is decided, and the bond fixed by the court is filed and accepted by the judge during the term in which the decree is rendered, and the appeal thus perfected, this will be an "allowance" of the appeal, and no petition is necessary; provided, however, that you assign errors at once, for by rules now in force, an assignment of errors must be filed before an appeal should be allowed. See Rule 11, Circuit Court of Appeals; "Assignments of Errors." The rule is applicable to equity causes as well as writs of error. *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed.

913; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 261.

If the appeal thus allowed in open court is perfected by filing in the appellate court the transcript and docketing the case within the required time, the issuance and service of a citation to the adversary party is not necessary. *Richardson v. Green*, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; *Jacobs v. George*, 150 U. S. 416, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Central Trust Co. v. Continental Trust Co.* 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 524; *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186; *Dodge v. Knowles*, 114 U. S. 430, 438, 29 L. ed. 144, 297, 5 Sup. Ct. Rep. 1108, 1197. If you have given notice of appeal in open court, but you have not given bond, or the security required during the term, then your notice is of no avail, and you must have issued and served on the opposite party or his counsel a citation, in form as will be hereafter given, unless waived. *Richardson v. Green*, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; *Radford v. Folsom*, 123 U. S. 727, 31 L. ed. 293, 8 Sup. Ct. Rep. 334; *Brown v. McConnell*, 124 U. S. 491, 31 L. ed. 496, 8 Sup. Ct. Rep. 559; *First Nat. Bank v. Omaha*, 96 U. S. 738, 24 L. ed. 881; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319.

If you do not give notice in open court, but determine afterwards to appeal, you must present a petition to the judge of the district, a circuit judge of the circuit, or the justice assigned to the circuit for permission to appeal, and citation must issue and be served. *Haskins v. St. Louis & S. E. R. Co.* 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643; *Ruby v. Atkinson*, 35 C. C. A. 458, 93 Fed. 579. But failure to serve in time does not necessarily dismiss the appeal. *Richards v. Mackall*, 113 U. S. 542, 28 L. ed. 1133, 5 Sup. Ct. Rep. 535; see *Pierce v. Cox*, 9 Wall. 787, 19 L. ed. 786. At the same time request that the amount of the bond be fixed, and file concurrently with these acts an assignment of errors in the clerk's office, presenting your grounds of objection, which must be confined to questions raised through the trial, or that are apparent in the record.

Petition for Appeal.

If the appeal is perfected in open court, the petition and citation is not necessary, for the transcript showing the appeal was taken in open court gives the appellate court jurisdiction; but if the appeal is taken after the term, though notice may have been given in open court, then you must file a petition as follows:

Title as in bill. }
 No. of case. } In Equity.

Petition for appeal filed....., A.
 D. 19..., in the District Court of the
 United States for.....District.

To the Hon....., District Judge, etc.:

The above named plaintiff (or defendant) feeling himself aggrieved by the decree made and entered in this cause on the.....day of....., A. D. 19..., does hereby appeal from said decree (or order) to the Circuit Court of Appeals for the.....Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for.....Circuit, sitting at

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

R. F.,
 Solicitor.

Tefft v. Stern, 21 C. C. A. 73, 43 U. S. App. 442, 74 Fed. 755.

If you desire a supersedeas, add "and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued." The judge usually endorses the petition.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of.....dollars.

A. B.,
 Judge, etc.

See *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186, 187.

“Or the appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of dollars, with sufficient sureties to be conditioned as required by law.” (See chapter 110.)

As said before, the judge of the district in which the case is tried, or the circuit judge of the circuit, or the justice assigned to the circuit, can act upon the petition (Rule 35, 79 C. C. A. liv., 90 Fed. lxvi. *United States v. Moy Yee Tai*, 48 C. C. A. 203, 109 Fed. 2; *Brown v. McConnell*, 124 U. S. 489-491, 31 L. ed. 495-497, 8 Sup. Ct. Rep. 559; *Copper River Min. Co. v. McClellan*, 70 C. C. A. 623, 138 Fed. 338), but cannot allow an appeal from another district while sitting in his own district (*United States v. Moy Yee Tai*, supra.) The act is not altogether ministerial in granting appeals, it is not a matter of course, says *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 355-363; *Brinkley v. Louisville & N. R. Co.* 95 Fed. 345-351. However, in *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, it is said the right of appeal is an absolute right, and no judge can condition the allowance, the procedure having been complied with. The judge passes on only the sufficiency of the security. *Pullman's Palace Car Co. v. Central Transp. Co.* 71 Fed. 809. There are cases where they have been disallowed, that is considered not appealable; but not where appealable, however frivolous (*Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 325; *Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 1); it is a matter of right, and mandamus will lie. *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. ed. 123, 125; *Thorn v. Pittard*, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 235. See *J. D. Randall Co. v. Foglesong Mach. Co.* 119 C. C. A. 185, 200 Fed. 742.

Motion for Supersedeas.

When bond has been given in time, and appellee seeks to have some action taken in the court below, you may enjoin the action, and move for a supersedeas after the appeal. *Washington, G. & A. R. Co. v. Bradley* (*Washington, G. & A. R. Co. v. Washington*) 7 Wall. 577, 19 L. ed. 274; *Slaughter-house Cases*, 10 Wall. 293, 19 L. ed. 921. The petition should be addressed to the circuit court of appeals, and in the following form:

Title as in appeal. In Equity.

Address Circuit Judges.

And now comes the appellant, A. B., in the above entitled cause and would show unto your Honors that on the.....day of, A. D. 19..., this cause came on to be heard before the Hon., judge of the.....district of....., sitting at....., and that on theday of....., A. D. 19..., a decree was entered in said cause in substance as follows (state fully the decree that the court may determine whether it be final).

That petitioner appealed from said decree, which said appeal was allowed on the.....day of....., A. D. 19..., and security given conditioned as provided by law, as will appear, reference being had to the proceedings here on file in this Honorable Court. That said security thus taken was such as properly to operate a supersedeas to stay all proceedings while this cause is pending on appeal before this Honorable Court.

Petitioner shows that, notwithstanding the allowance of the appeal in this cause, and the filing the security for its prosecution as aforesaid, appellees are seeking to take further proceedings in the court below (here state them). That said proceedings will work an injury and injustice to petitioner if permitted.

Wherefore petitioner prays this Honorable Court to issue a writ of supersedeas to the United States District Court for the.....District of, its judges, clerk and marshal, staying and enjoining said court, its judges, clerk and marshal, from taking or suffering to be taken before them any further proceedings herein until the hearing and decision by this court of the appeal taken herein and the return of the mandate thereon, and for such further relief as to this court may seem proper, and petitioner will ever pray, etc.

If granted, draw the decree containing substantially the prayer of the petition or in whatever form it may be granted. The writ issued is as follows:

UNITED STATES OF AMERICA.

The President of the United States to the Judges of the District Court of the United States for the.....District of....., and to the Clerk and Marshal of said District—Greeting:

Whereas an appeal has heretofore been taken to the United States Circuit Court of Appeals for the.....Circuit from a certain final decree entered in the United States District Court for the.....District ofon the.....day of....., A. D. 19..., in a certain cause wherein A. B. is complainant and appellant and C. D. is defendant and appellee; and whereas said appeal was taken and good and sufficient security was given in time to operate by virtue of the statute in such cases made and provided as a supersedeas and stay of all proceedings in said cause in said circuit court; now, therefore, we being willing that full jus-

tice should be done the said A. B., petitioner in this behalf, and that his rights should be fully protected, do command and enjoin you to refrain from taking or suffering to be taken before you any proceedings whatsoever, and especially (state proceedings sought to be taken) until the hearing and decision of this court on the appeal taken herein and the return to you of the mandate thereon.

Witness the Hon....., Chief Justice of the Supreme Court of the United States, this.....day of....., A. D. 19...

Attest:

Clerk

Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 160; Tuttle v. Claffin, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 8.

When an appeal is properly filed, appellate court may issue supersedeas to lower court on filing bond in the appellate court, if done in time. U. S. Rev. Stat. sec. 1007 (Comp. Stat. 1913, sec. 1666), sec. 1012, Comp. Stat. 1901; Bound v. South Carolina R. Co. 55 Fed. 188; Kitchen v. Randolph, 93 U. S. 88, 23 L. ed. 810; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 397; Peugh v. Davis, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17; Hudgins v. Kemp, 18 How. 535, 15 L. ed. 513; Slaughterhouse Cases, 10 Wall. 291, 19 L. ed. 920; Union Mut. L. Ins. Co. v. Windett, 36 Fed. 839; Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington), 7 Wall. 577, 19 L. ed. 274; Western U. Teleg. Co. v. Eyser, 19 Wall. 428, 22 L. ed. 44; Baltimore & O. R. Co. v. Harris, 7 Wall. 574, 19 L. ed. 100; French v. Shoemaker, 12 Wall. 100, 20 L. ed. 271.

CHAPTER CII.

ASSIGNMENT OF ERRORS.

With the petition for appeal must be assigned the matters complained of, and to correct which the appeal is prayed for, and this must be done whether the appeal be direct to the Supreme Court or the circuit court of appeals. (See "Notice of Appeal.") *United States v. Goodrich*, 4 C. C. A. 160, 12 U. S. App. 108, 54 Fed. 21; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 257; *Mutual L. Ins. Co. v. Conley*, 11 C. C. A. 116, 25 U. S. App. 86, 63 Fed. 180; *Webber v. Mihills*, 59 C. C. A. 577, 124 Fed. 64; *Moore v. Moore*, 58 C. C. A. 19, 121 Fed. 737. As to evidence of filing. *Copper River Min. Co. v. McClellan*, 70 C. C. A. 623, 138 Fed. 333; *Lockman v. Lang*, 62 C. C. A. 550, 128 Fed. 280, s. c. 65 C. C. A. 621, 132 Fed. 1. Rule 35 of Supreme Court rules requires that the appellant shall file with the clerk below, with his petition for an appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, and no appeal shall be allowed unless it is filed, and errors not assigned will be disregarded. Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii. U. S. Rev. Stat. sec. 937 (Comp. Stat. 1913, sec. 1563); *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23; *The Myrtie M. Ross*, 87 C. C. A. 175, 160 Fed. 19; *Stillwagon v. Baltimore & O. R. Co.* 86 C. C. A. 287, 159 Fed. 97; *Norfolk & W. R. Co. v. Gardner*, 89 C. C. A. 14, 162 Fed. 114. In *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, it is held that it is not necessary to assign errors before an appeal is allowed, as in an application for a writ of error, but the assignment may be filed at any time before the security is approved and accepted.

Rule 11 of the circuit court of appeals rules requires that the appellant shall file with the clerk below with his petition an assignment of errors, and no appeal shall be allowed until

the assignment of errors has been filed. This assignment forms part of the transcript, and must be printed with it. See Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii.; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; *Coulliette v. Thomason*, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787; See *P. P. Mast & Co. v. Superior Drill Co.* 83 C. C. A. 157, 154 Fed. 45; *Norfolk & W. R. Co. v. Gardner*, 89 C. C. A. 114, 162 Fed. 115; *Pittsburgh, C. C. & St. L. R. Co. v. Glinn*, 135 C. C. A. 46, 219 Fed. 148.

The purpose of the assignment is to advise the court of the questions it is called upon to decide, without going beyond the assignment itself, and it states the limits within which the appellant will be confined in presenting objections to the proceedings below. *Grape Creek Coal Co. v. Farmer's Loan & T. Co.* 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; *Findlay v. Pertz*, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 685; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408-415, 36 L. ed. 485-488, 12 Sup. Ct. Rep. 679; *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166. See *Simkins*, Fed. Eq. Suit, chap. 21.

Cross Errors.

Cross errors are not assignable in the Federal Courts, *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606; citing, *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 170-173; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 567.

Must Be Specific.

The assignment must not be argumentative, but direct (Rule 11 C. C. A.; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23); not general but specific (*Richardson v. Walton*, 9 C. C. A. 604, 17 U. S. App. 525, 61 Fed. 535; *Mitchell Transp. Co. v. Green*, 56 C. C. A. 455, 120 Fed. 49; *Baltimore v. Maryland*, 92 C. C. A. 335, 166 Fed. 645, and cases cited. *Florida C. & P. R. Co. v. Cutting*, 15 C. C. A. 597, 30 U. S. App. 428, 68 Fed. 586; *Guggenheim v. Kirchhofer*, 14 C. C. A. 72, 26 U. S. App. 664, 66 Fed. 755; *Ran-*

dolph v. Allen, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23; Hart v. Bowen, 31 C. C. A. 31, 58 U. S. App. 184, 86 Fed. 877; Findlay v. Pertz, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 681, 682; Adams v. Shirk, 44 C. C. A. 653, 105 Fed. 659; Anniston v. Safe Deposit & T. Co. 29 C. C. A. 457, 52 U. S. App. 510, 85 Fed. 856); for if it points out no particular error, it will not be noticed; Deering Harvester Co. v. Kelly, 43 C. C. A. 225, 103 Fed. 261; (U. S. Rev. Stat. sec. 997 (Comp. Stat. 1913, sec. 1653), Ibid.; Supreme Council C. K. A. v. Fidelity & C. Co. 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 49; see Rule 24, 79 C. C. A. xxxiii., 150 Fed. xxxiii.; Flagler v. Kidd, 24 C. C. A. 123, 45 U. S. App. 461, 78 Fed. 341; United States v. Ferguson, 24 C. C. A. 1, 45 U. S. App. 457, 78 Fed. 104; National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774); when error may be noticed though general or not assigned (Rule 24, 79 C. C. A. xxxiii., 150 Fed. xxxiii.; cl. 4; Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772; The Myrtie M. Ross, 87 C. C. A. 175, 160 Fed. 22). Thus, to assign that there is error in the decree, in that the court upon the evidence should have decreed for appellant, would be too general (Doe v. Waterloo Min. Co. 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, 18 Mor. Min. Rep. 265), but you must specify in what respect the decree is erroneous, and your reasons. (Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; McFarlane v. Golling, 22 C. C. A. 23, 46 U. S. App. 141, 76 Fed. 23.)

Your assignment is defective if the court is required to look in the brief for a specific statement of the question presented. Grape Creek Coal Co. v. Farmers' Loan & T. Co. 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; Hoge v. Magnes, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 355. So, general exceptions to a charge of the court at law are unavailing. Thom v. Pittard, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232; Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 645, and cases cited.

Form of Assignment.

Title as in bill.

And now, on this the..... day of....., A. D. 19..., came the defendant by his solicitor, R. F., and says that the decree entered in the

above cause on the.....day of....., A. D. 19..., is erroneous and unjust to defendant.

First. Because, etc. (stating specifically and separately each error complained of, and numbering them consecutively).

Wherefore the defendant prays that the said decree be reversed and the circuit court directed to dismiss the bill (or such relief as the nature of the case demands; or if the plaintiff assigns he may pray that the decree be reversed, and the circuit court be instructed to enter such decree as is prayed for by said bill, or that the court of appeals shall reverse and render a proper decree on the record, etc.).

R. S.,
Solicitors.

Time of Filing.

No appeal will be allowed unless the assignment of errors is filed with the petition. Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii.; *Mutual L. Ins. Co. v. Conoley*, 11 C. C. A. 116, 25 U. S. App. 86, 63 Fed. 180; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913, 917; *Savings & Loan Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 696; *Flahrity v. Union P. R. Co.* 6 C. C. A. 167, 12 U. S. App. 532, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 19 U. S. App. 660, 61 Fed. 808; *Frame v. Portland Gold Min. Co.* 47 C. C. A. 664, 108 Fed. 751; *United States v. Goodrich*, 4 C. C. A. 160, 12 U. S. App. 108, 54 Fed. 21; *Lockman v. Lang*, 62 C. C. A. 550, 128 Fed. 280. We have seen, in discussing the application of rule 11 C. C. A. and 35 of the Supreme Court, that the rule as stated above is unquestionably correct as to applications for writs of error, but in appeals the assignment of errors may be filed at any time before the security is approved and accepted. *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259; see *Re Olsen*, 40 C. C. A. 247, 100 Fed. 10; *Bernard v. Lee*, 127 C. C. A. 219, 210 Fed. 583.

Confined to the Issues.

You cannot import a question by your assignment; the pleadings must develop it. *Zadig v. Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Cornell v. Green*, 163 U. S. 80, 41 L. ed. 78, 16 Sup. Ct. Rep. 969; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 575, 40 L. ed. 540, 16 Sup. Ct. Rep. S. Eq.—43.

389; Woodbury v. Shawneetown, 20 C. C. A. 400, 34 U. S. App. 655, 74 Fed. 205; Cheney v. Bacon, 1 C. C. A. 244, 4 U. S. App. 207, 49 Fed. 305. And while error is assignable to the ruling or order, it is not assignable to reasons given for the ruling or order. Russell v. Kern, 16 C. C. A. 154, 34 U. S. App. 90, 69 Fed. 94; McFarlane v. Golling, 22 C. C. A. 23, 46 U. S. App. 141, 76 Fed. 24, and cases cited. Thus, assignments on the opinion of the court are not noticed. Ibid.; see rule 14 circuit court of appeals, sec. 2; Columbus Safe Deposit Co. v. Burke, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 633; Evans v. Suess Ornamental Glass Co. 28 C. C. A. 24, 53 U. S. App. 567, 83 Fed. 706; North American Loan & T. Co. v. Colonial & U. S. Mortg. Co. 28 C. C. A. 88, 55 U. S. App. 157, 83 Fed. 796; Mutual Reserve Fund Life Asso. v. Du Bois, 29 C. C. A. 354, 56 U. S. App. 586, 85 Fed. 586.

Consent Decree.

Assignments are not allowed on consent decrees, nor upon error in one's favor (McCafferty v. Celluloid Co. 43 C. C. A. 540, 61 U. S. App. 394, 104 Fed. 305; Ritter v. Mutual L. Ins. Co. 169 U. S. 144, 42 L. ed. 694, 18 Sup. Ct. Rep. 300); unless consent is denied, when the issue may be carried up by appeal (Kaw Valley Drainage Dist. v. Union P. R. Co. 90 C. C. A. 320, 163 Fed. 837).

To the Admission or Rejection of Evidence.

By Supreme Court rule 13 and circuit court of appeals rule 12, it is provided that in all cases in equity no objection will be heard to the admission or rejection of evidence of such depositions, deeds, or other exhibits found in the record, unless objection was taken thereto and entered of record in the court below, but the same shall otherwise be deemed to be admitted by consent. Thus, to warrant a consideration of a ruling in evidence in equity, the ruling and exceptions must be taken when admitted or rejected over objections at the time, and it must so appear to have been taken in the record. (See "Bill of Exceptions.") Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co. 43 C. C. A. 511, 104 Fed. 243; Bunker Hill & S.

Min. & Concentrating Co. v. Oberder, 25 C. C. A. 171, 48 U. S. App. 339, 79 Fed. 726; Sipes v. Seymour, 22 C. C. A. 90, 40 U. S. App. 185, 76 Fed. 118. .

An assignment of error to the admission or rejection of evidence should quote the full substance of the evidence rejected or admitted. Rule 11, circuit court of appeals rules; rule 35, Supreme Court rules. Cass County v. Gibson, 46 C. C. A. 341, 107 Fed. 363; North Chicago Street R. Co. v. St. John, 29 C. C. A. 634, 57 U. S. App. 366, 85 Fed. 806; Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; Newman v. Virginia T. & C. Steel & I. Co. 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 231; Columbus Safe Deposit Co. v. Burke, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 630; Gallot v. United States, 31 C. C. A. 44, 58 U. S. App. 243, 87 Fed. 446; New Orleans & N. E. R. Co. v. Clements, 40 C. C. A. 465, 100 Fed. 419; Ladd v. Missouri Coal & Min. Co. 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 880; see Hoge v. Magnes, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 358. General assignments that the court erred in admitting or rejecting evidence will not be considered. Supreme Council, C. K. A. v. Fidelity & C. Co. 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 49; Oswego Twp. v. Travelers' Ins. Co. 17 C. C. A. 77, 36 U. S. App. 13, 70 Fed. 225; National Bank v. First Nat. Bank, 10 C. C. A. 87, 27 U. S. App. 88, 61 Fed. 809. Assignments of error are controlled by Federal, not State law. Shipman v. Ohio Coal Exch. 17 C. C. A. 313, 37 U. S. App. 471, 70 Fed. 654.

CHAPTER CIII.

ALLOWANCE OF APPEAL.

We have discussed the filing of a petition for an appeal, and the assignment of errors which we have seen should precede the allowance of an appeal. Circuit court of appeals rule 11. We have also seen that an appeal must be allowed, and who should allow the appeal. (See "Petition for Appeal" chapter 101, p. 666.)

See Section 132, New Code, chapter 6 (Comp. Stat. 1913, sec. 1124), by whom and how allowed. Effective—January 1st, 1912.

It is said in *Brinkley v. Louisville & N. R. Co.* 95 Fed. 350, 351, that no case can be found authorizing the refusal of an appeal, however frivolous or vexatious. However, this case seems to recognize that it can be done. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 325. The appeal must be allowed (*Barrel v. Western Transp. Co.* [*Barrell v. The Mohawk*] 3 Wall. 424, 18 L. ed. 168; *McCourt v. Singers-Bigger*, 80 C. C. A. 56, 150 Fed. 104; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 326; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840; *Warner v. Texas & P. R. Co.* 4 C. C. A. 673, 13 U. S. App. 236, 54 Fed. 922; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 390, 391, and cases cited), but the statute makes no provisions in terms for form of allowance (U. S. Rev. Stat. sec. 692, U. S. Comp. Stat. 1901, p. 566), the filing of the petition and assignment of errors within six months is not sufficient (*Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 839). See *Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 286, as to writ of error, and *Blaffer v. New Orleans Water Supply Co.* 160 Fed. 391.

The oral request in open court, or the petition and prayer for appeal in vacation, with the order allowing it, makes a valid

appeal. However, it has been held that no formal order is necessary. *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165-167, and cases cited; *Loveless v. Ransom*, 48 C. C. A. 434, 109 Fed. 391; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989. The signing of the citation by the judge, or the approval of the bond, has been held to allow the appeal. *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, and cases cited; *Sage v. Central R. Co.* 96 U. S. 714, 715, 24 L. ed. 643, 644; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 167; see *Brown v. McConnell*, 124 U. S. 490, 31 L. ed. 496, 8 Sup. Ct. Rep. 559; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314, 317; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989; *Re Goodman*, 42 C. C. A. 85, 101 Fed. 920; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916; *Re Fiechtel*, 46 C. C. A. 497, 107 Fed. 618; *McDaniel v. Stroud*, 45 C. C. A. 446, 106 Fed. 492; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840.

So it has been held that the bond is not essential (*Edmonson v. Bloomshire*, 7 Wall. 311, 19 L. ed. 92; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786; see "Bond"); that is, an appeal may be perfected notwithstanding security was not given within the time allowed for appeal (*Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851), and it seems allowance of appeal relates back (*Radford v. Folsom*, 123 U. S. 725, 31 L. ed. 292, 8 Sup. Ct. Rep. 334; *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1060, 10 Sup. Ct. Rep. 638; *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493); but the allowance of appeal depends on giving bond; such appeal is not perfected until bond is given (*Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 1.)

Allowance in Forma Pauperis.

27 Stat. at L. 252, chap. 209 (Comp. Stat. 1913, sec. 1626); *The Presto*, 35 C. C. A. 394, 93 Fed. 522; *Columb v. Webster Mfg. Co.* 76 Fed. 198; *Fuller v. Montague*, 53 Fed. 206; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196,

85 Fed. 851. As to the affidavit, see *Re Collier*, 93 Fed. 191; *Volk v. B. F. Sturtevant Co.* 39 C. C. A. 646, 99 Fed. 533; *Donovan v. Salem & P. Nev. Co.* 134 Fed. 316, 317; *Whelan v. Manhattan R. Co.* 86 Fed. 219; *McDuffee v. Boston & M. R. Co.* 82 Fed. 865; *Woods v. Bailey*, 111 Fed. 121. There was a great divergence of opinion among the circuit courts as to the application of the act to appeals and writs of error (see *Bristol v. United States*, 63 C. C. A. 529, 129 Fed. 88, 89, for authorities pro and con); but in *Bradford v. Southern R. Co.* 195 U. S. 243, 49 L. ed. 178, 25 Sup. Ct. Rep. 55, it is said appeals cannot be taken under the act. This case is followed in *Re Bradford*, 71 C. C. A. 334, 139 Fed. 518, and *Taylor v. Adams Exp. Co.* 90 C. C. A. 526, 164 Fed. 616, overruling *Reed v. Pennsylvania Co.* 49 C. C. A. 572, 111 Fed. 714.

When Jurisdiction of the Appellate Court Attaches.

Jurisdiction of the appellate court attaches when the appeal is allowed, provided the appeal has been taken within the time limited. *Noonan v. Chester Park Athletic Club Co.* 35 C. C. A. 457, 93 Fed. 576 (See "Time for Appealing"). See *Morrin v. Lawler*, 91 Fed. 694; *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186; *Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 286; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; *Butt v. United States*, 126 Fed. 794; *Fowler v. Hamill*, 139 U. S. 550, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; *Whitsitt v. Union Depot & R. Co.* 122 U. S. 363, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1248. As we have seen the United States circuit court of appeals has no jurisdiction of appeal not taken within six months from the entry of the judgment. *Connecticut F. Ins. Co. v. Oldendorff*, 19 C. C. A. 379, 44 U. S. App. 487, 73 Fed. 90, and cases cited; *Coulliette v. Thomason*, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787, judiciary act 1891, sec. 11 (Comp. Stat. 1913, sec. 1647). An appeal in open court is inoperative unless prosecuted within the time (*Credit Co. v. Arkansas C. R. Co.* 128 U. S. 259-261, 32 L. ed. 449, 450, 9 Sup. Ct. Rep. 107); and it seems that an allowance relates back to date of prayer for.

Bond.

The next step is to prepare and file a bond covering the amount required by the court in allowing the appeal, whether it be for costs or a supersedeas. By section 11 of the act of 1891, it is provided that all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in said act in respect to the circuit court of appeals, including all provisions for bonds or other security required or to be taken on such appeals, etc., and any judge of the circuit court of appeals in respect of cases brought, or to be brought to that court, shall have the same powers and duties as to allowance of appeals, etc., and the conditions of such allowance, as now by law belong to judges of the existing courts of the United States respectively.

The provision of law then in force and referred to in this clause of the section was U. S. Rev. Stat. sec. 1000 (Comp. Stat. 1913, sec. 1660), requiring the judge to take good security that the appellant shall prosecute his appeal to effect, and if he fail to make good his plea, shall answer all damages and costs, where the writ is a supersedeas and stays execution; or all costs when not a supersedeas. *O'Reilly v. Edrington*, 96 U. S. 724, 24 L. ed. 659. But the bond is not jurisdictional, and may be waived. *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638.

Amount of Bond.

By rule 13, circuit court of appeals, it is provided that supersedeas bonds in the circuit and district courts of the United States must be taken with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. When the judgment or decree is for money *not otherwise secured*, the bond should be for the whole amount recovered, and in addition it must cover an amount of the probable damages, costs, and interest which may accrue. 31 C. C. A. liii, 47 Fed. vi. S. C. Rule 32, 6 Wall. v.

If, however, it be a foreclosure, or in suits where the prop-

erty is in court, or follows the controversy, as in real actions and replevin, then the indemnity required will be the amount sufficient to secure the sum recovered for the use and detention of the property, the costs of suit, just damages for delay, and costs and interest on appeal. *Louisville N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 1; *Kountze v. Omaha Hotel Co.* 107 U. S. 389, 27 L. ed. 613, 2 Sup. Ct. Rep. 911, 74 Fed. 1, 2; *Clark v. Patton*, 93 Fed. 342.

This rule is not applicable where no supersedeas is asked (*Wheeling Bridge & Terminal R. Co. v. Cochran*, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 143), and U. S. Rev. Stat. sec. 1000, would apply in such cases. The judge who takes the security on appeal is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of practice. *Jerome v. McCarter*, 21 Wall. 17-33, 22 L. ed. 515-517. See "supersedeas." *Ex parte French*, 100 U. S. 5, 25 L. ed. 530; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289; *Mexican Nat. Constr. Co. v. Reusens*, 118 U. S. 54, 30 L. ed. 78, 6 Sup. Ct. Rep. 945. This rule applies except when the bond has been fraudulently obtained. *Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605.

Form of Bond on Appeal.

Title as in bill.

Bond on Appeal.

Know all Men by these Presents: That we, A. B., as principal, and, as sureties, acknowledge ourselves to be jointly indebted to C. D., appellee in the above cause, in the sum of (as indicated by the judge allowing the appeal), conditioned that, whereas, on the day of, A. D. 19 . . ., in the District Court of the United States for the District of, in a suit depending in that court, wherein A. B. was plaintiff and C. D. was defendant, numbered on the equity docket as, a decree was rendered against the said A. B. and the said A. B. having obtained an appeal to the, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said C. D. citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Circuit, to be holden in the city of, in the State of, on the day of, A. D. 19 . . . next.

Now, if the said A. B. shall prosecute his appeal to effect and answer

all damages and costs (or all costs only if not a supersedeas) if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. B.,
Sureties.

Approved (date)
Judge, etc.

See *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820; *Kail v. Wetmore*, 6 Wall. 451, 18 L. ed. 862.

To Whom Payable.

It should be made payable to the appellees, and where the only party to whom it is made payable is not an appellee, the appeal will be dismissed (*Swan v. Hill*, 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 178; *Swift v. Kortrecht*, 49 C. C. A. 68, 110 Fed. 328), but the court will allow names to be inserted (*Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 260 and cases cited; *Davenport v. Fletcher*, 16 How. 142, 14 L. ed. 879; *Hill v. Chicago & E. R. Co.* 129 U. S. 175, 32 L. ed. 653, 9 Sup. Ct. Rep. 269), or defects to be cured.

Conditions.

The bond is not good when the conditions stated in it are not in conformity to the law. *Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed. 728; *Swan v. Hill*, 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 178. There is no obligation. *Steele v. Crider*, 61 Fed. 484. Thus, "to answer all costs and damages in the event the decree is confirmed," instead of "if it fails to make its plea good" (*Peace River Phosphate Co. v. Edwards*, supra.); but if containing the required conditions, then added conditions are surplusage (*Omaha Hotel Co. v. Kountze*, 107 U. S. 395, 27 L. ed. 616, 2 Sup. Ct. Rep. 911, see rule 13 C. C. A., U. S. Rev. Stat. sec. 1000 (Comp. Stat. 1913, sec. 1660); *Gay v. Parpart*, 101 U. S. 392, 25 L. ed. 841).

By Whom Signed.

See rule 13 C. C. A., U. S. Rev. Stat. sec. 1000. It should be signed by the appellant and sureties; however, it is not necessary for all appellants to join in bond, for if approved, it stands as security. *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 319; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 261; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820. Where partners appeal, the individual partners should sign. *The Protector*, 11 Wall. 82, 20 L. ed. 47. Unless it can be amended by the record the appeal will be dismissed. *Moore v. Simonds*, 100 U. S. 145, 25 L. ed. 590; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916; *Estis v. Trabue*, 128 U. S. 229, 32 L. ed. 438, 9 Sup. Ct. Rep. 58.

The sureties must sign, and their sufficiency must be determined by the judge, and he may require as many as he deems necessary. *Jerome v. McCarter*, 21 Wall. 17-33, 22 L. ed. 515-517; *Ex parte French*, 100 U. S. 5, 25 L. ed. 530; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289; *Mexican Nat. Constr. Co. v. Reusens*, 118 U. S. 54, 30 L. ed. 78, 6 Sup. Ct. Rep. 945.

Approval by the Judge.

By U. S. Rev. Stat. sec. 1000, the security for appeal is to be taken by the judge who signed the citation and allowed the appeal. This statute has received a liberal construction, and the bond may be approved by any judge or justice who could allow the appeal (*Brown v. Northwestern Mut. L. Ins. Co.* 55 C. C. A. 654; *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643, 119 Fed. 149, 150); but the bond must be approved by a judge or justice who could allow the appeal. This duty cannot be delegated to the clerk or a commissioner. *O'Reilly v. Edrington*, 96 U. S. 726, 24 L. ed. 659; *Haskins v. St. Louis & S. E. R. Co.* 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; U. S. Rev. Stat. sec. 1000 (Comp. Stat. 1913, sec. 1660), also sec. 1012 (*Id.* sec. 1673); *Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849; *Warner v. Texas & P. R. Co.* 4 C. C. A. 670, 2 U. S. App. 647, 54 Fed. 920; *First Nat. Bank v. Omaha*, 96 U. S. 738, 24 L. ed. 881; *Anson Co. v. Blue*

Ridge R. Co. 23 How. 2, 16 L. ed. 518. The bond may be approved out of Court. *Hudgens v. Kemp*, 18 How. 530, 15 L. ed. 511.

Swearing obligor as to solvency has been held an approval. *Silver v. Ladd*, 6 Wall. 440, 18 L. ed. 828. And an approval has been held to be a sufficient allowance of an appeal. *Peter Ham Brewery Co. v. Security Title & T. Co.* 46 C. C. A. 497, 107 Fed. 618, 619; see *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 257; *Keyser v. Farr*, 105 U. S. 266, 26 L. ed. 1026. If the judge refuses to approve, the appellate court may be applied to for approval. *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643; *Hudson v. Parker*, 156 U. S. 284, 39 L. ed. 426, 15 Sup. Ct. Rep. 450, 9 Am. Crim. Rep. 91; *Anson Co. v. Blue Ridge R. Co.* 23 How. 2, 16 L. ed. 518. But an approval obtained by fraud destroys the bond. *Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605.

Effect of Irregularities in Giving Bond.

The appeal will not be dismissed for irregularities in giving bond. *Union P. R. Co. v. Callaghan*, 161 U. S. 95, 40 L. ed. 629, 16 Sup. Ct. Rep. 493; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 466; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 321. The court will not necessarily dismiss an appeal for want of a bond, but will grant time to furnish one. *Edwards v. United States*, 102 U. S. 576, 26 L. ed. 293; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786; *Seymour v. Freer*, 5 Wall. 822, 18 L. ed. 491; *Davis v. Wakelee*, 156 U. S. 685, 39 L. ed. 583, 15 Sup. Ct. Rep. 555; *The Presto*, 35 C. C. A. 394, 93 Fed. 524; see *Walker v. Houghteling*, 44 C. C. A. 18, 104 Fed. 513; *Davidson v. Lanier*, 4 Wall. 454, 18 L. ed. 379. Nor will waiver of bond affect jurisdiction. *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638. Bond may be given at any time while appeal is alive (*Edmonson v. Bloomshire*, 7 Wall. 312, 19 L. ed. 92; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; *Brown v. McConnell*, 124 U. S. 492, 31 L. ed. 497, 8 Sup. Ct. Rep. 559);

but not after four years (*Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786). Delay of a month in filing bond not unreasonable. *Schenck v. Diamond Match Co.* 19 C. C. A. 352, 39 U. S. App. 191, 73 Fed. 22. See *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; and *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 393, deciding that an appeal may be perfected though the security was not given within six months from the entry of the decree,—and cases cited. Failure to mention term not fatal (*Davis v. Wakelee*, 156 U. S. 685, 39 L. ed. 583, 15 Sup. Ct. Rep. 555), but an appeal from circuit to Supreme Court cannot be sustained without a bond for costs. *Selma & M. R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. ed. 32; *Re Newman*, 79 Fed. 615. A bond given on appeal from a case at law is a nullity. *Jabine v. Oates*, 115 Fed. 864; *Saltmarsh v. Tuthill*, 12 How. 389, 13 L. ed. 1035; *Nelson v. Lowndes County*, 35 C. C. A. 419, 93 Fed. 538.

Amendment of Bond.

The bond may be amended in the appellate court (*Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314; *Morrin v. Lawler*, 91 Fed. 694); or an application to file a new bond may be made (*Clarke v. Eureka County Bank*, 131 Fed. 145; *Morrin v. Lawler*, 91 Fed. 693; *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 463; *Swift v. Kortrecht*, 49 C. C. A. 68, 110 Fed. 328; *Brown v. McConnell*, 124 U. S. 492, 31 L. ed. 497, 8 Sup. Ct. Rep. 559; *Draper v. Davis*, 102 U. S. 370, 26 L. ed. 121).

When Becomes Insufficient After Appeal.

If bond becomes insufficient as a supersedeas, the court may require another to be given, or dismiss appeal on failure to do so. *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *Williams v. Clafflin*, 103 U. S. 753, 754, 26 L. ed. 606, 607. See *Johnson v. Waters*, 108 U. S. 4, 27 L. ed. 630, 1 Sup. Ct. Rep. 1.

CHAPTER CIV.

SUPERSEDEAS BOND.

Power to Grant.

There is no question of the power of the court to grant a supersedeas in case of an appeal from a final decree and the right is discretionary. *Tornanses v. Melsing*, 45 C. C. A. 615, 106 Fed. 775-787; *Timolat v. Philadelphia Pneumatic Tool Co.* 130 Fed. 903; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 547, 548; *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735. See Rule 36 S. C. and Sec. 11 of Act Mch. 3 1891, U. S. Rev. Stat. secs. 1000-1007 (Comp. Stat. 1913, secs. 1660-1666); equity rule 93, *Leonard v. Ozark Land Co.* 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 127. This rule as stated above is unquestionably true in appeals from injunctions (*New River Mineral Co. v. Seeley*, 117 Fed. 982; see "Appeal in Injunctions"), but in appeals in other causes a supersedeas is a statutory right. U. S. Rev. Stat. secs. 1000, 1007, 1012 (Comp. Stat. 1913, secs. 1660, 1666, 1673); *McCourt v. Singer-Bigger*, 76 C. C. A. 73, 145 Fed. 103, 7 A. & E. Ann. Cas. 287 and cases cited. But the amount is discretionary, and a supersedeas may be granted though the bond be very much less than the amount recovered, especially when the decree declares a lien. *Louisville N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 2; *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 151; *Fuller v. Aylesworth*, 21 C. C. A. 505, 43 U. S. App. 657, 75 Fed. 694. But supersedeas is a statutory remedy, and there should be a strict compliance with all required conditions, and when complied with, the bond operates as a supersedeas *per se*, and suspends power of court below. See *Covington Stock Yards Co. v. Keith*, 121 U. S. 250, 30 L. ed. 914, 7 Sup. Ct. Rep. 881; *Sage v. Central R. Co.* 93 U. S. 417, 23 L. ed.

935; *Jabine v. Oates*, 115 Fed. 864; *Gunn v. Black*, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 159, 160. The rule is, then, that, when the judgment is for the recovery of money otherwise unsecured, the security must cover the whole amount of the judgment, but where the property follows the event of the suit, the amount is in the discretion of the court. *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *Fuller v. Aylesworth*, 21 C. C. A. 505, 43 U. S. App. 657, 75 Fed. 694. To have the effect of a supersedeas, the appeal must be perfected within sixty days, excluding Sundays, after the rendition of the decree, that is, appeal taken, and security filed. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; *Logan v. Goodwin*, 41 C. C. A. 573, 101 Fed. 656; *French v. Shoemaker*, 12 Wall. 100, 20 L. ed. 271; *Western U. Teleg. Co. v. Eyser*, 19 Wall. 428, 22 L. ed. 44 (See Chapt. 119); *Washington & A. R. Co. v. Bradley* (*Washington & A. R. Co. v. Washington*) 7 Wall. 577, 19 L. ed. 274. U. S. Rev. Stat. sec. 1007 (Comp. Stat. 1913, sec. 1666). After that time, in view of Rev. Stat. sec. 1007, which applies to appeals as well as writs of error, the bond will not have the effect of a supersedeas. *Ibid.*; *Union Mut. L. Ins. Co. v. Windett*, 36 Fed. 839; *Brown v. Evans*, 8 Sawy. 502, 18 Fed. 56; *New England R. Co. v. Hyde*, 41 C. C. A. 404, 101 Fed. 397; *Western Air Line Constr. Co. v. McGillis*, 127 U. S. 777, 32 L. ed. 325, 8 Sup. Ct. Rep. 1390. But the appeal having been sued out within sixty days, the bond may be given afterwards with the permission of a justice or judge of the appellate court. U. S. Rev. Stat. sec. 1007; *Peugh v. Davis*, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17. If the appeal is not so taken, a supersedeas cannot be awarded subsequently. *New England R. Co. v. Hyde*, 41 C. C. A. 404, 101 Fed. 398; *Logan v. Goodwin*, 41 C. C. A. 573, 101 Fed. 654; *Sage v. Central R. Co.* 93 U. S. 417, 23 L. ed. 935. As to when a writ of error operates as a supersedeas, U. S. Rev. Stat. sec. 1007 (Comp. Stat. 1913, sec. 1666), see *Kitchen v. Randolph*, 93 U. S. 92, 23 L. ed. 812; *Wurts v. Hoagland*, 105 U. S. 703, 26 L. ed. 1110.

Effect of Supersedeas Bond.

In ordinary chancery causes, not involving action as to an

injunction, an appeal, if the supersedeas bond be given in accordance with the statute, operates as a supersedeas. *New River Mineral Co. v. Seeley*, 117 Fed. 982; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; U. S. Rev. Stat. secs. 1000, 1007, 1012 (Comp. Stat. 1913, secs. 1660, 1666, 1673).

The supersedeas stays the effect of the decree until affirmance; that is, no action by execution, or otherwise, can be taken under the decree after the bond has been approved. It suspends the power of the court below to take any proceedings under the decree, or if an execution has been issued or other proceedings begun, it prohibits any further steps to be taken. *Stafford v. King*, 32 C. C. A. 536, 61 U. S. App. 487, 90 Fed. 140; *Hovey v. McDonald*, 109 U. S. 157, 27 L. ed. 890, 3 Sup. Ct. Rep. 136; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530; *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 669.

In *Jerome v. McCarter*, 21 Wall. 28, 22 L. ed. 516, it is said that a bond given as a supersedeas, but not providing for security for costs, would be insufficient as a supersedeas. It covers the amount appealed from, damages for delay, and costs. *American Surety Co. v. North Packing & Provision Co.* 102 C. C. A. 258, 178 Fed. 810.

A supersedeas bond given on appeal from an order issuing an execution at once stops any proceeding under the execution (*Wood v. Brown*, 43 C. C. A. 474, 104 Fed. 207; see *United States ex rel. Harshman v. County Ct.* 39 Fed. 757); or if from the appointment of a receiver, the power of the receiver is suspended and appellant is entitled to a return of the property (*Tornanses v. Melsing*, 45 C. C. A. 615, 106 Fed. 775); or granting a writ of possession (*Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 925). However, the supersedeas bond does not preclude collateral or independent proceedings based on grounds not involving the issues settled by the decree. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 54 Fed. 26.

Liability on Supersedeas Bond.

By U. S. Rev. Stat. sec. 1000 (Comp. Stat. 1913, sec. 1660), the bond is required of appellant, conditioned that he shall prosecute his appeal to effect, and if he fail to make his plea

good, he shall answer all damages and costs when the writ is a supersedeas, etc. Supreme Court rules 29; circuit court of appeals rule 13.

This condition covers all compensation for delay arising from the appeal, as well as the amount in the decree appealed from, so far as the latter directs the payment of money. Wood v. Brown, 43 C. C. A. 474, 104 Fed. 206, and cases cited; Egan v. Chicago G. W. R. Co. 163 Fed. 350, and cases cited; Jerome v. McCarter, 21 Wall. 17, 22 L. ed. 515. Pike v. Gregory, 55 C. C. A. 78, 118 Fed. 128; Davis v. Patrick, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 911; Brown v. Northwestern Mut. L. Ins. Co. 55 C. C. A. 654, 119 Fed. 149; Woodworth v. Northwestern Mut. L. Ins. Co. 185 U. S. 354, 46 L. ed. 945, 22 Sup. Ct. Rep. 676; Rosenstein v. Tarr, 51 Fed. 370, s. c. 3 C. C. A. 466, 5 U. S. App. 197, 53 Fed. 112; Crane v. Buckley, 150 Fed. 402, s. c. 70 C. C. A. 452, 138 Fed. 22; Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923; American Surety Co. v. North Packing & Provision Co. 102 C. C. A. 258, 178 Fed. 810; and costs of both courts, Expanded Metal Co. v. Bradford, 177 Fed. 604; Richards v. Harrison, 218 Fed. 138.

Damages Covered By.

But the damages sought must be the result of the supersedeas. Ibid.

To illustrate: Where a supersedeas bond has been given in a suit involving injunctive relief, and damages are sought for violating the injunction, such damages would not arise under, nor be covered by, the supersedeas bond, as the supersedeas did not suspend the effect of the injunction, as has been heretofore stated. In a word, the damage sustained is not the result of the supersedeas. The remedy was by contempt proceedings, or an action for damages independent of the bond. Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923; Buckley v. Crane, 59 C. C. A. 109, 123 Fed. 29.

Failure to Prosecute Appeal.

The bond becomes operative when accepted, and any failure

to prosecute the appeal to effect, as failing to file the transcript in the appellate court under the statute and rules of the court, is a breach of the condition, and the obligor and sureties become liable. *Smith v. Pendergast*, 82 Fed. 506; *Crane v. Buckley*, 70 C. C. A. 452, 138 Fed. 22. So a judgment of affirmance fixes the liability of the principal and sureties. *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820; *Third Nat. Bank v. Gordon*, 53 Fed. 473, s. c. 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 792; *Egan v. Chicago G. W. R. Co.* 163 Fed. 350.

Sureties.

As to the obligee, sureties are principals, and nothing but reversal discharges sureties on an appeal bond (*Ibid.*; *Babbitt v. Finn* [*Babbitt v. Shields*], 101 U. S. 14, 15, 25 L. ed. 822; *Gordon v. Third Nat. Bank*, 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 792-796); nor will they be discharged by requiring new bond for further appeal (*Babbitt v. Finn* [*Babbitt v. Shields*], 101 U. S. 13, 14, 25 L. ed. 821, 822.)

Motion to Vacate Supersedeas.

If the supersedeas has been granted without authority, as where the appeal was not perfected in sixty days, or for any other cause, you may file in the appellate court a motion to vacate the supersedeas (*Hudgins v. Kemp*, 18 How. 530, 15 L. ed. 511) in the following form (*Brown v. Evans*, 8 Sawy. 502, 18 Fed. 57).

Title of case as appealed.

And now come the appellees in this cause by....., their counsel, and move the court to vacate the supersedeas in the above cause, or for an order declaring the appeal bond filed by appellant in said cause does not operate as a supersedeas, because the appeal was not sued out within sixty days after the rendering of the judgment entered and complained of in said cause.

R. F.,
Solicitor, etc.

Patterson v. Hoa, 131 U. S. lxxxviii., Appx. and 18 L. ed. S. Eq.—44.

884; *Knox County v. United States*, 131 U. S. clxvi., Appx. and 25 L. ed. 191; *Kitchen v. Randolph*, 93 U. S. 89, 23 L. ed. 811; *Sage v. Central R. Co.* 93 U. S. 416, 23 L. ed. 934.

The action of a judge approving an amount to give the bond the effect of a supersedeas will not be set aside, except great abuse is apparent (*Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289); or, as we have before seen, when approval procured by fraud (*Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605).

When approved and the record filed the district judge cannot vacate the supersedeas. *Kendrick v. Roberts*, 214 Fed. 268.

CHAPTER CV.

CITATION IN APPEAL.

A citation is a formal written notice to the adverse party that an appeal has been allowed in the case, and notifying appellee that he must appear in the appellate court at the time designated therein if he desires to be heard. *Villabolas v. United States*, 6 How. 90, 12 L. ed. 356; *Dodge v. Knowles*, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197. The citation is signed by the judge or justice authorized to grant the appeal (U. S. Rev. Stat. sec. 999 (Comp. Stat. 1913, sec. 1659), Rule 8, circuit court of appeals); but failure to sign is cured by the appearance of appellees (*Freeman v. Clay*, 48 Fed. 849).

When Necessary.

Unless the appeal is taken and perfected in open court, as before explained, or unless waived, a citation is necessary to be issued, and served on the adverse party. *Richardson v. Green*, 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443. So when the appeal is taken after the term in which the decree is entered, a citation must be issued or the appeal will be dismissed. *Jacobs v. George*, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 159; *Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 3; *West v. Erwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

In *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159, the following rules governing the issuance of a citation in appeals are laid down for guidance:

First. No citation is necessary when notice of appeal in open court has been given and the appeal perfected at the term in which the decree was entered, by filing in the appellate court the transcript and docketing the cause in the required time.

McNulta v. West Chicago Park, 39 C. C. A. 545, 99 Fed. 328; Re Fiechtl, 46 C. C. A. 497, 107 Fed. 619 and cases cited; Swift v. Kortrecht, 49 C. C. A. 68, 110 Fed. 328; King v. Thompson, 49 C. C. A. 59, 110 Fed. 319; Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517; Noonan v. Chester Park Athletic Club Co. 35 C. C. A. 457, 93 Fed. 577.

Second. Though notice is given in open court, a citation is necessary if the appeal is not perfected, as above stated, until after the term in which the decree was entered. Ruby v. Atkinson, 35 C. C. A. 458, 93 Fed. 577; Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Haskins v. St. Louis & S. E. R. Co. 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72.

Third. A citation, unless waived, is always necessary when the appeal is allowed after the term. Jacobs v. George, 150 U. S. 416, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Railroad Equipment Co. v. Southern R. Co. 34 C. C. A. 519, 92 Fed. 541; see Gray v. Grand Forks Mercantile Co. 70 C. C. A. 634, 138 Fed. 346; Sage v. Central R. Co. 96 U. S. 715, 24 L. ed. 643.

Fourth. Also when allowed at a subsequent term, though in open court. Jacobs v. George, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 159; Chicago & P. R. Co. v. Blair, 100 U. S. 662, 25 L. ed. 587.

May Be Waived.

The issue of citation is not *fundamentally* jurisdictional, and may be waived. Berliner Gramophone Co. v. Seaman, 47 C. C. A. 630, 108 Fed. 715; Mattingly v. Northwestern Virginia R. Co. 158 U. S. 56, 39 L. ed. 895, 15 Sup. Ct. Rep. 725; Farmers' Loan & T. Co. v. Chicago & N. P. R. Co. 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 317; Richardson v. Green, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; Andrews v. National Foundry & Pipe Works, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 775; Mendenhall v. Hall, 134 U. S. 567, 33 L. ed. 1015, 10 Sup. Ct. Rep. 616; Railroad Equipment Co. v. Southern R. Co. 34 C. C. A. 519, 92 Fed. 544; Farmers' Loan & T. Co. v. Chicago &

N. P. R. Co. 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 316, 317; Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 4, and cases cited.

A failure to issue and serve a citation, the appeal being allowed and docketed, will not be ground for dismissal until after an opportunity has been given to do so. *Ibid.*

It is not intended to give jurisdiction, but an opportunity to appear. *Ibid.*

It seems that where counsel for appellee indorsed the appeal bond it was held a waiver of citation. *Goodwin v. Fox*, 120 U. S. 775, 30 L. ed. 815, 7 Sup. Ct. Rep. 779. So, joining in a motion to dismiss appeal was a waiver. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 774. So a general appearance in the appellate court waives the citation. *Richardson v. Green*, 130 U. S. 115, 32 L. ed. 875, 9 Sup. Ct. Rep. 443. Or any act acknowledging notice. *Tripp v. Santa Rosa Street R. Co.* 140 U. S. 129, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

When citation is necessary the following form may be used:

United States of America to..... Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the.....District of....., wherein is complainant and are defendants, an appeal has been allowed the.....therein to the..... You are hereby cited and admonished to be and appear in said court at....., days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon....., judge of the United States District Court for the.....District of....., this theday of....., A. D. 19...

M. S.

United States Circuit Judge.

Shiras, Equity Practice, p. 209; U. S. Rev. Stat. sec. 999 (Comp. Stat. 1913, sec. 1659).

It may be stated that the rule is settled, that, except in cases of appeal allowed in open court during the term in which the decree is entered, a citation returnable at the same term with the appeal is necessary to perfect jurisdiction, unless waived. *Jacobs v. George*, 150 U. S. 417, 37 L. ed. 1128, 14

Sup. Ct. Rep. 159; *West v. Erwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 420; *Railroad Equipment Co. v. Southern R. Co.* 34 C. C. A. 519, 92 Fed. 544; *Henry v. Alabama & V. R. Co.* 164 U. S. 701, 41 L. ed. 1180, 17 Sup. Ct. Rep. 994; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; *Pender v. Brown*, 56 C. C. A. 646, 120 Fed. 497.

When May Be Issued and When Returnable.

Whether the appeal be to the Supreme Court or circuit court of appeals, the citation must be made returnable not exceeding thirty days from date of signing, and whether the return day fall in term time or vacation, and must be served before the return day. Supreme Court rule 8, sec. 5, and rule 9, sec. 1; 137 U. S. 710; see *Washington v. Dennison*, 6 Wall. 496, 18 L. ed. 863; *Seagrist v. Crabtree*, 127 U. S. 774, 32 L. ed. 324, 8 Sup. Ct. Rep. 1394; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 152; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165. (See "How Served.")

It may be issued properly returnable even after expiration of time for taking appeal, if allowance of appeal made in time. *Altenberg v. Grant*, rule 8, par. 5, S. C. 137 U. S. 710, 28 C. C. A. 224, 54 U. S. App. 312, 83 Fed. 981, and cases cited; *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Seagrist v. Crabtree*, 127 U. S. 773, 32 L. ed. 323, 8 Sup. Ct. Rep. 1394; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; circuit court of appeals rule 14, sec. 5. However, there is some variance in this rule fixing the return day in the different circuits, as well as in the language, to which your attention is called in order to examine the rules of your circuit.

In appeals from interlocutory orders granting or continuing an injunction in the fifth circuit, the citation is returnable ten days from its date. In other cases appeals and citations are made returnable not exceeding thirty days from the day of signing the citation whether it fall in term time or vacation, and must be served before the return day, rule 14, par. 5, 5th circuit. In the eighth circuit the citation is returnable in sixty

days from the day of signing the citation. I believe, however, the different circuits generally follow the 8th S. C. rule, par. 5.

How Served.

If the service is not accepted it may be served by any citizen, who must make affidavit that he delivered a copy of the citation to the appellee as follows:

State of.....

County of.....

On this the.....day of....., A. D. 19..., personally appeared before the undersigned authority Richard Roe, who, being sworn, says that he delivered a copy of the within citation to C. D. or (R. F., Solicitor of C. D.).

Sworn to before me this the.....day of....., A. D. 19...

L. R.,

[SEAL.]

Notary Public.

See *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 334, 44 L. ed. 1092, 20 Sup. Ct. Rep. 906.

Service may be made on the attorney of the appellee, and such service is good for all parties represented by him. *Davis v. Wakelee*, 156 U. S. 684, 39 L. ed. 582, 15 Sup. Ct. Rep. 555; *Bigler v. Waller*, 12 Wall. 147, 20 L. ed. 261. And an attorney cannot withdraw so as to prevent service. *Dayton v. Lash*, 94 U. S. 112, 24 L. ed. 33; *Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 606, 43 L. ed. 1104, 19 Sup. Ct. Rep. 761. So, acceptance on the citation by the attorney of record is sufficient. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 774. You cannot send it through the postoffice (*Tripp v. Santa Rosa Street R. Co.* 144 U. S. 129, 36 L. ed. 372, 12 Sup. Ct. Rep. 655); but may leave copy at house. (*Ibid.*) It must be served to give jurisdiction. *Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed. 728; *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; *Davidson v. Lanier*, 4 Wall. 447, 18 L. ed. 377; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 11, 25 L. ed. 821. However, where parties are numerous, notice to a few of each class who should appear in good faith in defense of the interests of that class would be sufficient. *Kidder v. Fidelity Ins. Trust*

& S. D. Co. 44 C. C. A. 593, 105 Fed. 825, and cases cited. As to service of writs of error, U. S. Rev. Stat. sec. 1007 (Comp. Stat. 1913, sec. 1666), see *McCarley v. McGee*, 108 Fed. 497. Service may be perfected by personal service, as in the service of ordinary process. *Ibid.*

Alias Citation.

The court of appeals may order an alias citation to bring in parties not served under the original (*Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980), if appeal docketed in time. *Railroad Equipment Co. v. Southern R. Co.* 34 C. C. A. 519, 92 Fed. 544; *Shute v. Keyser*, 149 U. S. 650, 37 L. ed. 884, 13 Sup. Ct. Rep. 960. But if not issued and served before end of next ensuing term, appeal becomes inoperative if not waived. *Jacobs v. George*, 150 U. S. 416, 417, 37 L. ed. 1127, 1128, 14 Sup. Ct. Rep. 159, and authorities; see *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; *Bloomington v. Watson*, 62 C. C. A. 600, 128 Fed. 269.

CHAPTER CVI.

WHO MAY APPEAL.

It may be stated, as a general rule, that all parties having an interest in the cause, and affected by the decree should join in the appeal. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 821; *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627 and cases cited. *Simpson v. Greeley*, 20 Wall. 158, 22 L. ed. 339; *Sipperley v. Smith*, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15; *Davis v. Mercantile Trust Co.* 152 U. S. 593, 38 L. ed. 564, 14 Sup. Ct. Rep. 693; *Wilson v. Kiesel*, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; *St. Louis United Elevator Co. v. Nichols*, 34 C. C. A. 90, 91 Fed. 833; *Dodson v. Fletcher*, 24 C. C. A. 69, 49 U. S. App. 61, 78 Fed. 214; *Hedges v. Seibert Cylinder Oil Cup Co.* 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643; *Aiken v. Smith*, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; *Humes v. Third Nat. Bank*, 4 C. C. A. 668, 13 U. S. App. 86, 54 Fed. 917; *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41; *Hardee v. Wilson*, 146 U. S. 180, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; *Fordyce v. Trigg*, 175 U. S. 723, 44 L. ed. 337, 20 Sup. Ct. Rep. 1024 (See "Who Made Parties to Appeal"); but parties not affected by the decree need not join (*Gilfillan v. McKee*, 159 U. S. 312, 40 L. ed. 163, 16 Sup. Ct. Rep. 6; *Louisville, N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 5; *Farmers' Loan & T. Co. v. Waterman*, 106 U. S. 269, 270, 27 L. ed. 116, 117, 1 Sup. Ct. Rep. 131; *Basket v. Hassell*, 107 U. S. 608, 27 L. ed. 501, 2 Sup. Ct. Rep. 415; *Postal Teleg. Cable Co. v. Vane*, 26 C. C. A. 342, 53 U. S. App. 319, 80 Fed. 961); as in cases where the decree is several, and interest separate (*Ibid.*; *Hall v. Gambrill*, 34 C. C. A. 190, 63 U. S. App. 740, 92 Fed. 32; *Grand Island & W. C. R. Co. v. Sweeney*, 43 C. C. A. 255, 103 Fed. 342; *Hanrick v. Patrick*, 119 U. S. 164, 30 L. ed. 402, 7 Sup. Ct.

Rep. 147). See *Provident Life & T. Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 857, 858; *Lamon v. Speer Hardware Co.* 119 C. C. A. 1, 198 Fed. 453; *Orleans-Kenner Electric R. Co. v. Dunbar*, 134 C. C. A. 152, 218 Fed. 345; *Winters v. United States*, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207; *Fulton Invest. Co. v. Dorsey*, 136 C. C. A. 108, 220 Fed. 298. The interest must be substantial, not a remote consequence of the judgment. *Hamilton Trust Co. v. Cornucopia Mines Co.* 139 C. C. A. —, 223 Fed. 494.

That parties having an interest in the decree must join in the appeal has been held to be jurisdictional, unless there has been a summons and severance. *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41-49; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 821; *Ayres v. Polsdorfer*, 45 C. C. A. 24, 105 Fed. 737; *Dolan v. Jennings*, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; *Estis v. Trabue*, 128 U. S. 230, 32 L. ed. 438, 9 Sup. Ct. Rep. 58; *Hanrick v. Patrick*, 119 U. S. 163, 30 L. ed. 402, 7 Sup. Ct. Rep. 147; *The Columbia*, 15 C. C. A. 91, 29 U. S. App. 647, 67 Fed. 944; *Fitzpatrick v. Graham*, 56 C. C. A. 95, 119 Fed. 353; *Hedges v. Seivert Cylinder Oil Cup Co.* 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643. But not when interest nominal, or not substantial. *Higbee v. Chadwick*, 136 C. C. A. 317, 220 Fed. 874, and cases cited.

Summons and Severance in Appeal.

If the parties interested refused to join, then you should apply to the judge for a severance, which is done by first serving the parties with notice that you intend to appeal and request them to join; if they refuse, then file a motion in court stating the facts and the refusal, and a copy of the notice served, and pray for a severance. The motion with the order of severance must be made a part of the record to give jurisdiction. *Faulkner v. Hutchins*, 61 C. C. A. 425, 126 Fed. 363; *Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 217; *Provident Life & Trust Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 854; *Detroit v. Guaranty Trust Co.* 93 C. C. A. 604, 168 Fed. 610; *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. ed. 76, 14

Sup. Ct. Rep. 237; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786; *Winters v. United States*, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207; *Farmers' Loan & T. Co. v. McClure*, 24 C. C. A. 66, 49 U. S. App. 46, 78 Fed. 211; *Re Key*, 189 U. S. 84, 47 L. ed. 720, 23 Sup. Ct. Rep. 624; *Provident Life & T. Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 854.

A separate appeal by one of several joint defendants is not maintainable until after notice, and refusal. *Higbee v. Chadwick*, 136 C. C. A. 317, 220 Fed. 873. *Ibid.*; *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786. The excuse for nonjoinder must appear in the record. *Inglehart v. Stansbury*, 151 U. S. 72, 38 L. ed. 77, 14 Sup. Ct. Rep. 237. And where one of two or more defendants does not join in the appeal, and he has not been served with summons and notice of severance he cannot be made a party by amendment after the time for appeal has expired (*Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 217; *Consumers' Cotton Oil Co. v. Nichol*, 57 C. C. A. 321, 120 Fed. 818); and objection may be made at any time (*Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 626; *Ayres v. Polsdorfer*, 45 C. C. A. 24, 105 Fed. 737); but it seems that upon appeal taken by one of several defendants in a joint decree, in open court, and allowed by the court at the time the decree is entered, when all parties are presumed to be present, that such allowance will be equivalent to "summons and severance." *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *McNulta v. West Chicago Park*, 39 C. C. A. 545, 99 Fed. 328; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 824; *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174; *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 319; *Detroit v. Guaranty Co.* 93 C. C. A. 604, 168 Fed. 611.

Appeals by Parties Not Parties to the Original Proceedings Below.

The general rule is that one who is not a party or privy to a decree cannot appeal therefrom. *Guion v. Liverpool & L. & G. Ins. Co.* 109 U. S. 173, 27 L. ed. 895, 3 Sup. Ct. Rep. 108;

Aiken v. Smith, 4 C. C. A. 652, 2 U. S. App. 445, 54 Fed. 895; Ex parte Cutting, 94 U. S. 19, 20, 24 L. ed. 50; Ex parte Cockcroft, 104 U. S. 578, 26 L. ed. 856; Cook v. Lasher, 19 C. C. A. 654, 42 U. S. App. 42, 73 Fed. 704; Elwell v. Fosdick, 134 U. S. 513, 33 L. ed. 1002, 10 Sup. Ct. Rep. 598; Re Woerishoffer, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916, and cases cited. But sometimes the interests of parties not made parties to the original proceedings are affected by the decree to such an extent that the courts have recognized their right to have the decree revised.

Thus a purchaser of property under a decree becomes a party to all subsequent proceedings had after the sale, and he may appeal from the action of the trial court affecting his rights. Kneeland v. American Loan & T. Co. 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950; Davis v. Mercantile Trust Co. 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 504, 34 L. ed. 1024, 11 Sup. Ct. Rep. 405; Andrews v. National Foundry & Pipe Works, 76 Fed. 166; Williams v. Morgan, 111 U. S. 697, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; see Sage v. Central R. Co. 93 U. S. 419, 23 L. ed. 935. However, see Swann v. Wright (Swann v. Fabyan) 110 U. S. 601, 28 L. ed. 256, 4 Sup. Ct. Rep. 235, where a purchaser at foreclosure could not attack prior liens. Central Trust Co. v. Grant Locomotive Works, 135 U. S. 222, 34 L. ed. 103, 10 Sup. Ct. Rep. 736; Central Trust Co. v. Georgia P. R. Co. 30 C. C. A. 648, 58 U. S. App. 120, 87 Fed. 293. So where a sale is subject to conditions, a purchaser cannot be heard upon them. Kneeland v. American Loan & T. Co. 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950. Nor can he dispute the correctness of the decree. Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 305; Baltimore Trust & Guarantee Co. v. Hofstetter, 29 C. C. A. 35, 56 U. S. App. 122, 85 Fed. 78; see also Stuart v. Gay, 127 U. S. 530, 32 L. ed. 195, 8 Sup. Ct. Rep. 1279.

An appeal by one not a party to the original proceedings must be perfected by a sworn petition, setting up the interest and how affected by the decree, and praying to be permitted to intervene in order to appeal. See Aiken v. Smith, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; Sage v. Central R. Co. 93 U. S. 418, 419, 23 L. ed. 935, 936.

Parties Dying After Decree.

(Act 1875, sec. 9, 18 Stat. at L. 473, chap. 137.)

When a party dies after judgment and before the time for an appeal elapses, his personal representatives may enter an appeal, etc. *Conaway v. Third Nat. Bank*, 92 C. C. A. 488, 167 Fed. 26; *Dolan v. Jennings*, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584. (See "Effect of Death on Appeal," chap. 109, p. 723.)

Party Not Appealing.

If a party does not appeal, the decree cannot be reversed, though error has been committed affecting his rights (*Southern P. R. Co. v. United States*, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4; *Mt. Pleasant v. Beckwith*, 100 U. S. 527, 25 L. ed. 702; *United States v. Blackfeather*, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64; *Cherokee Nation v. Blackfeather* [*United States v. Blackfeather*] 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63; *The Stephen Morgan* [*The Stephen Morgan v. Good*] 94 U. S. 599, 24 L. ed. 266; *Bensiek v. Thomas*, 13 C. C. A. 451, 27 U. S. App. 765, 66 Fed. 106), though he has assigned error (*United States v. Blackfeather*, *supra*; *Muskogee Nat. Teleph. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382; *O'Neil v. Wolcott Min. Co.* 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 528).

An Appeal From a Fictitious Case.

There can be no appeal if there is no actual controversy (*Little v. Bowers*, 134 U. S. 558, 33 L. ed. 1020, 10 Sup. Ct. Rep. 620; *California v. San Pablo & T. R. Co.* 149 U. S. 314, 37 L. ed. 748, 13 Sup. Ct. Rep. 876; *East Tennessee V. & G. R. Co. v. Southern Teleg. Co.* 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391; *Lord v. Veazie*, 8 How. 255, 12 L. ed. 1069); nor after compromise (*Dakota County v. Glidden*, 113 U. S. 226, 28 L. ed. 982, 5 Sup. Ct. Rep. 428); nor if collusive (*Benner v. Hayes*, 26 C. C. A. 271, 53 U. S. App. 376, 80 Fed. 953; *Weaver v. Kelly*, 34 C. C. A. 423, 92 Fed. 421; *Arnold v. Woolsey*, 4 C. C. A. 319, 12 U. S. App. 157, 54 Fed. 269); nor where possibility of relief ceases pending

suit (*Mills v. Green*, 159 U. S. 654, 40 L. ed. 294, 16 Sup. Ct. Rep. 132). One who was paid a judgment is not precluded from appealing. *Hoogendorn v. Daniel*, 120 C. C. A. 537, 202 Fed. 432.

As to Appeals by Interveners.

Will not lie on refusal to allow intervention, because intervention is within the discretion of the court. *Re Columbia Real Estate Co.* 50 C. C. A. 406, 112 Fed. 645, and cases cited. *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 665; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Creditors Commutation Co. v. United States*, 34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; *S. C.* 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Buel v. Farmers' Loan & T. Co.* 44 C. C. A. 213, 104 Fed. 839. However, in certain applications for intervention, where a party would be denied all relief by refusing the intervention, such leave to intervene is not discretionary, and may be appealed from (see chapter 80). *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739; *Credits Commutation Co. v. United States*, 177 U. S. 315, 316, 44 L. ed. 785, 786, 20 Sup. Ct. Rep. 636. But having intervened, may appeal as when, after intervention allowed, they have been dismissed. *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 672; *Kneeland v. American Loan & T. Co.* 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950; *Williams v. Morgan*, 111 U. S. 696, 699, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; *Rice v. Durham Water Co.* 91 Fed. 434; *Re Michigan C. R. Co.* 59 C. C. A. 643, 124 Fed. 727-730 and cases cited. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 823. And when appeal taken where intervener did not join, the appellate court will not consider refusal of court to grant the relief prayed for by intervener. *Muskogee Nat. Teleph. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382.

As to Appeals By and Against Receivers.

A receiver in foreclosure suit may appeal, though not a party

(*Hinckley v. Gilman*, C. & S. R. Co. 94 U. S. 469, 24 L. ed. 166; *Hovey v. McDonald*, 109 U. S. 155, 27 L. ed. 889, 3 Sup. Ct. Rep. 136); but not when his intervention has been refused without prejudice. As to appeals by receivers, see *Bosworth v. St. Louis Terminal R. Asso.* 174 U. S. 182-186, 43 L. ed. 941-943, 19 Sup. Ct. Rep. 625. He cannot question orders of the court, or conditions of his appointment, unless they affect his personal rights. *Hunt v. Illinois C. R. Co.* 37 C. C. A. 548, 96 Fed. 647, 648; *Chapman v. Atlantic Trust Co.* 56 C. C. A. 61, 119 Fed. 266; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 824; see *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 151; *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 324; *Illinois Trust & Sav. Bank v. Kilbourne*, 22 C. C. A. 599, 44 U. S. App. 663, 76 Fed. 883.

Appeal by Partners.

You cannot appeal in firm name, but must state the individual members of the firm (*Estis v. Trabue*, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58), and each must sign bond (*The Protector*, 11 Wall. 82, 20 L. ed. 47; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 915); and both as to appellants and appellee, individual names must be given; no collective designation is permitted. This does not apply to corporations. *Ibid.*

Cross Appeals.

An appellee may file a cross appeal at the same time with appellant's appeal, or he may file it at any time within the time limit, but the same rules regarding assignments of error and procedure in appeals must be pursued, without reference to appellant's appeal. *Hilton v. Dickinson*, 108 U. S. 168, 27 L. ed. 689, 2 Sup. Ct. Rep. 424; *Building & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827; *Morrison v. Kuhn*, 26 C. C. A. 130, 52 U. S. App. 178, 80 Fed. 741; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840. It cannot be done by assigning cross errors (*O'Neil v. Wolcott Min. Co.* 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 528; *Ætna Indemnity Co. v. J. R. Crowe Coal*

& Min. Co. 83 C. C. A. 431, 154 Fed. 567; Guarantee Co. of N. A. v. Phenix Ins. Co. 59 C. C. A. 376, 124 Fed. 172; Shawnee County v. Hurley, 94 C. C. A. 362, 169 Fed. 94), except that the transcript filed by one party may be used by both. U. S. Rev. Stat. sec. 1013 (Comp. Stat. 1913, sec. 1655); circuit court of appeals rules 25; Supreme Court rules 22.

Who Made Parties to Appeal.

All parties to the record interested in the decision are entitled to be heard on appeal has already been stated when discussing "*Who may Appeal*" above. For further authorities, see Kidder v. Fidelity Ins. Trust & S. D. Co. 44 C. C. A. 593, 105 Fed. 823, and cases cited. Grand Island & W. C. R. Co. v. Sweeney, 37 C. C. A. 127, 95 Fed. 396, s. c. 43 C. C. A. 255, 103 Fed. 342. Railroad Equipment Co. v. Southern R. Co. 34 C. C. A. 519, 92 Fed. 541; Bloomingdale v. Watson, 62 C. C. A. 600, 128 Fed. 269; Johnson v. Trust Co. 43 C. C. A. 458, 104 Fed. 174; Detroit v. Guaranty Trust Co. 93 C. C. A. 604, 168 Fed. 611; Farmers' Loan & T. Co. v. Longworth, 22 C. C. A. 420, 48 U. S. App. 71, 76 Fed. 610. And this is true though parties have defaulted. American Loan & T. Co. v. Clark, 27 C. C. A. 522, 49 U. S. App. 571, 83 Fed. 230.

An insolvent corporation is a necessary party to an appeal from a decree ordering a receiver to pay certain judgments. Farmers' Loan & T. Co. v. Longworth, *supra*. Subcontractors are necessary parties to an appeal from a decree holding them liable with the contractors. Grand Island & W. C. R. Co. v. Sweeney, 37 C. C. A. 127, 95 Fed. 398. So purchasers at sale under a mortgage, and the mortgagor, should be made parties to an appeal from the confirmation of the sale. Davis v. Mercantile Trust Co. 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950. So in an appeal from decree of foreclosure. Davis v. Mercantile Trust Co. 152 U. S. 594, 595, 38 L. ed. 565, 14 Sup. Ct. Rep. 693. The appeal will be dismissed where the record shows the absence of a party vitally interested. Hook v. Mercantile Trust

Co. 36 C. C. A. 645, 95 Fed. 41; *Wilson v. Kiesel*, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; *Hardee v. Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 34; *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *Faulkner v. Hutchins*, 61 C. C. A. 425, 126 Fed. 363. Except as before stated, where parties are very numerous, service of citation upon several of a class who appear in good faith in defense of the class interests will be sufficient. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 825; citing *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 867. See *Re Jemison Mercantile Co.* 50 C. C. A. 641, 112 Fed. 969. As to creditors appealing in bankrupt matters see also *Re A. L. Robertshaw Mfg. Co.* 135 Fed. 221, 222.

S. Eq.—45.

CHAPTER CVII.

TRANSCRIPT.

The rules of both the Supreme Court and circuit court of appeals require, as we have seen, the return of the citation for appeal not exceeding thirty days from the signing by the judge, and whether in term time or vacation. Circuit court of appeals rule 14, sec. 5; *id.*, rule 16; Supreme Court rule 8, sec. 5; U. S. Rev. Stat. sec. 999 (Comp. Stat. 1913, sec. 1659). *Edmonson v. Bloomshire*, 7 Wall. 309, 310, 19 L. ed. 91, 92; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165.

You have, then, the duty upon you of prosecuting vigorously the appeal, as you have only thirty days within which to file the transcript in the appellate court (circuit court of appeals rule 16), unless for good cause shown the justice or judge who signed the citation, or any judge of the circuit court of appeals, extends the time *by* or *before* its expiration. *West v. Irwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

If the order of enlargement is given, you must file it with the clerk of the circuit court of appeals. The appellant should then at once direct the clerk to make out the transcript and forward to the clerk of the appellate court. *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 167; *Re Alden-Electric Co.* 59 C. C. A. 509, 123 Fed. 415.

The six months given within which to file the appeal does not affect this rule. You have that time to consider whether you will appeal or not, but, having sued out your appeal, then you have only thirty days to file the transcript in the court of appeals, unless extended as stated.

If the transcript is not filed under the rule, the appellee may have the case docketed and dismissed on certificate that an appeal had been sued out and not prosecuted. Rule 9, S. C.;

circuit court of appeals, rule 16. See *Love v. Busch*, 73 C. C. A. 545, 142 Fed. 431; *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493; *Hill v. Chicago & E. R. Co.* 129 U. S. 174, 32 L. ed. 653, 9 Sup. Ct. Rep. 269; *Hill v. Chicago & E. R. Co.* 140 U. S. 53, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; *Richardson v. Green*, 130 U. S. 111, 32 L. ed. 874, 9 Sup. Ct. Rep. 443; *Small v. Northern P. R. Co.* 134 U. S. 515, 33 L. ed. 1007, 10 Sup. Ct. Rep. 614; *Stevens v. Clark*, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 324; *Pender v. Brown*, 56 C. C. A. 647, 120 Fed. 497. The filing of the record is a jurisdictional necessity. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 242. It seems, however, that the failure to docket in time will not be noticed if no motion to have it dismissed on certificate is made (*West Chicago Street R. Co. v. Ellsworth*, 23 C. C. A. 393, 46 U. S. App. 603, 77 Fed. 664, and authorities), before it is docketed. *Ouings v. Tiernan*, 10 Pet. 24, 9 L. ed. 333; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 463; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 149. See *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314, for excuse for failure to file in time. As to return of transcript in writ of error, see *Gilman v. Fernald*, 72 C. C. A. 666, 141 Fed. 940, and cases cited.

What Transcript to Contain.

By U. S. Rev. Stat. sec. 698 (Comp. Stat. 1913, sec. 1654), also *Ibid.* sec. 750 (Comp. Stat. 1913, sec. 1604), it is provided that the transcript in an appeal in equity should contain the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as *may be necessary* on the hearing of the appeal; that they shall be transmitted to the Supreme Court, and the court below or the appellate court can order any original document to be sent up in lieu of the copy.

By equity rule 75 (a), it shall be the duty of the appellant to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service

of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated in the transcript on appeal. The appellee, should he desire additional portions of the record incorporated in the record, shall file his *præcipe* also within ten days thereafter, unless the court or judge enlarges the time, indicating the portions of the record he desires incorporated. Re General Equity Rule 75 (c), 138 C. C. A. 574, 222 Fed. 884. If any difference arises concerning the directions of either party, such difference must be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule, and his decision will be the guide for the clerk. *Hoe v. Kahler*, 27 Fed. 145; *Union P. R. Co. v. Stewart*, 95 U. S. 279, 24 L. ed. 431; Re General Equity Rule 75, *supra*. The clerk should have no discretion in the matter, though intimated otherwise in *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1, as he is not learned in the law, or sufficiently familiar with the issues or the evidence to determine the matter. This is clearly intimated in *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131, and approved in *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 244. If the court cannot be reached to determine the question, it is the clerk's duty to insert the whole matter. *Ibid.* *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120, and cases cited. See *Re A. L. Robertshaw Mfg. Co.* 135 Fed. 222.

By equity rule 76, care must be taken to avoid the inclusion of more than one copy of any paper, and to exclude the formal and immaterial parts of all exhibits, documents, and other papers included therein. For infraction of this rule the appellate court will impose costs, and they may be imposed on the solicitors disregarding the rule.

How Evidence to be Stated in the Transcript.

By equity rule No. 75, the evidence shall not be set out in full, but shall be stated in simple and condensed form, omitting all evidence not essential to the decision of the questions presented in the appeal; and the testimony of witnesses bearing upon the issue must be stated in narrative form; but if desired

by either party the exact language of the witness may be stated if permitted by the court or judge. This duty of condensing rests primarily upon the appellant, and it must be prepared by him and lodged in the clerk's office for examination by other parties; and the statement as thus made must be lodged with the clerk at or before the time required for filing his *præcipe* as required by this rule. Re Equity Rule 75, 138 C. C. A. 574, 222 Fed. 885. If the evidence is set out in full it must be remedied. Rule 76 *id.* Louisville & N. R. Co. v. United States, 238 U. S. 1, 59 L. ed. 1177, 35 Sup. Ct. Rep. 696; Wong Keow v. United States, 131 C. C. A. 403, 215 Fed. 95; United States v. Motion Picture Patents Co. 230 Fed. 541.

Facts in the Clerk's Office.

When the appellant lodges his statement of facts in the clerk's office, he shall notify the other parties or their solicitors of such lodgment, and in the notice shall state time and place when he will ask the approval of the court or judge of said statement; but the time must be within ten days after service of the notice.

Presenting the Statement to the Court.

At the expiration of the time named in the notice, unless the time is enlarged by the court or judge, the statement, together with any objections made by the appellee, or such amendments as are proposed by either party, shall be presented to the court or judge for approval. Whatever then is necessary to complete and properly prepare the statement in accordance with the rule may be done under the direction of the court or judge, and shall, after that, be approved by him and filed in the clerk's office as a part of the record of appeal.

By Supreme Court rule 8 the clerk of the court below is required to transmit a true copy of the record and assignment of errors (rule 11, circuit court of appeals) and all proceedings in the case under his hand and the seal of the court (Supreme Court rule 8, sec. 1). Also a copy of the opinion of the court below, if one has been rendered. Supreme Court rule 8, sec. 2; Loeb v. Columbia Twp. 179 U. S. 483, 45 L. ed. 287, 21 Sup. Ct. Rep. 174; Teller v. United States, 49 C. C.

A. 263, 111 Fed. 120. See *Townsend v. Beatrice Cemetery Asso.* 70 C. C. A. 521, 138 Fed. 381; *Pacific Sheet Metal Works v. Californian Canneries Co.* 91 C. C. A. 108, 164 Fed. 984; as to force of opinion. It also provides that no case will be heard unless a complete record, containing in itself, and *not by reference*, all the papers, exhibits, depositions, and other proceedings *necessary to a hearing*, and that original papers may be ordered up with the record. Supreme Court rule 8, secs. 3 and 4; circuit court of appeals rule 14; *Dowagiac Mfg. Co. v. Brennan*, 156 Fed. 213. The transcript, of course, includes the pleadings, that is, the bill, process, return showing jurisdiction, then answer showing issues, then the evidence by both parties. Next, opinion of the court and its decree. Then should follow the appellate proceedings containing petition for appeal, assignment of errors, order allowing appeal, and bond, citation in appeal and service if not given in open court; and finally the clerk's certificate, sec. 698 (Comp. Stat. 1913, sec. 1654). *McIlwaine v. Ellington*, 99 Fed. 133; *Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49; *Redfield v. Parks*, 130 U. S. 624, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 326, 327; *Merriman v. Chicago, D. & V. R. Co.* 56 C. C. A. 536, 120 Fed. 240; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 41, 42.

The record in an equity suit usually means the proceedings from filing the bill to the final decree, and the procedure in getting the cause to the appellate court.

By new rule 77 a further method of appeal has been provided where the issue can be decided without an examination of all the pleadings and evidence filed and taken in the case. The rule is as follows:

What Transcript to Contain, on Agreed Statement.

Where the questions on appeal can be determined without an examination of all the pleadings and evidence, the parties, with the approval of the court before whom the case is tried, or the judge thereof, may prepare and sign a statement of the case showing how the question arose and where decided in the district court, and setting forth only so much of the facts alleged and proved as is essential to a decision of such ques-

tions, and, with the decree in the case shall be copied and certified to the appellate court as the record.

The transcript for a cross appeal is governed by the same rules. U. S. Rev. Stat. sec. 1013 (U. S. Comp. Stat. 1913, sec. 1655); *Gregory v. Pike*, 12 C. C. A. 202, 21 U. S. App. 474, 64 Fed. 415; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

If counsel wishes to stipulate what the transcript should contain, it may be drawn as follows:

A. B., Appellant,

vs.

C. D., Appellee

United States Circuit Court of Appeals for the.....Circuit.

Appeal from the United States District Court for the.....District of

.....

It is hereby stipulated by counsel for both parties in the above cause that the clerk in making up the transcript may omit therefrom the following papers and records (here set forth what is to be omitted), and that an order may be entered accordingly with the permission of the court.

R. F.,

Counsel for A. B., Appellant.

E. F.,

Counsel for C. D., Appellee.

Date.....

Certificate to the Transcript.

Section 997, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1653), requires an authenticated transcript of the record, and rule 8 of the Supreme Court rules, and rule 14 (79 C. C. A. xxviii, 90 Fed. cxxv.), of the circuit court of appeals, require a true copy of the record, assignment of errors, and all proceedings in the case under the hand of the clerk and seal of the court to be transmitted to the appellate court. *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120. U. S. Rev. Stat. sec. 698 (Comp. Stat. 1913, sec. 1654). Rev. Stat. sec. 750 (Comp. Stat. 1913, sec. 1604).

The certificate must show that the transcript is complete, and not simply that the matters contained in the transcript are correct copies (*Ruby v. Atkinson*, 35 C. C. A. 458, 93 Fed. 577; *Meyer v. Mansur & T. Implement Co.* 29 C. C. A.

465, 52 U. S. App. 474, 85 Fed. 874, 875; Jacksonville, T. & K. W. R. Co. v. American Constr. Co. 6 C. C. A. 249, 13 U. S. App. 377, 57 Fed. 66; Farmers' Loan & T. Co. v. Eaton, 51 C. C. A. 640, 114 Fed. 18; See "*Form of Certificate*"), or it must show that the record as sent up was designated by the stipulations of counsel, or that the clerk was guided by rule 75 in preparing the transcript, and selecting the papers necessary to a hearing (Burnham v. North Chicago Street R. Co. 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168; Meyer v. Mansur & T. Implement Co. 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; Farmers' Loan & T. Co. v. Eaton, 51 C. C. A. 640, 114 Fed. 18).

In *Pennsylvania Co. v. Jacksonville T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131 "that the foregoing is a true, full and complete transcript of all the papers, orders and decrees from the files and records of my office in the above-entitled cause," was sufficient.

In *Cutting v. Tavares, O. & A. R. Co.* 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 150, a certificate, "that the foregoing papers, numbered from 1 to 200, inclusive, is a true, full, and complete transcript of so much of the said records, papers, exhibits and proceedings in the said cause of.....as now appears and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files and orders therein contained as they are now of file and of record in my office,"—was held insufficient.

Form of Certificate.

I, W. R., clerk of the District Court of the United States for the..... District of....., in the.....circuit, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and all proceedings had in cause No..... equity, wherein A. B. is complainant and C. D. is defendant, as fully as the same remains on file and of record in my office at.....,

Witness my hand officially and the seal of said court at....., theday of....., A. D. 19...

Clerk, etc.

See *Redfield v. Parks*, 130 U. S. 624, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642; *Pennsylvania Co. v. Jacksonville, T. & K. W. R.*

Co. 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131; Meyer v. Mansur & T. Implement Co. 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Garneau v. Dozier, 100 U. S. 7, 25 L. ed. 536.

If there should be an issue raised as to the omitted portions, and it does not appear that the omitted parts are "necessary to a hearing," it will not support a motion to dismiss the appeals. If, however, the appellee thinks the transcript is defective, then he should resort to a certiorari to bring up a complete record. Nashua & L. R. Corp. v. Boston & L. R. Corp. 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237, 238; Cutting v. Tavares, O. & A. R. Co. 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 150, as to sufficiency of a transcript where the records were burned.

If the clerk refuses to sign the certificate, you may reach him by mandamus. Nashua & L. R. Corp. v. Boston & L. R. Corp. supra. If there be no certificate, leave will be granted to withdraw the record and supply it. Hodges v. Vaughan, 19 Wall. 12, 22 L. ed. 46. Matters tacked to the transcript, and not certified, are not part of the record. Grand County v. King, 14 C. C. A. 421, 32 U. S. App. 402, 67 Fed. 945.

If appeal is dismissed, you may take second appeal if in time. Evans v. State Nat. Bank, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493.

Bill of Exceptions.

It is seen that a true copy of a bill of exceptions is required to be certified with assignment of errors, etc., by circuit court of appeals rule 14, sec. 1. This applies to writs of error, and not appeals, as a bill of exceptions proper is not known to equity. As said in Southern Bldg. & L. Asso. v. Carey, 117 Fed. 325: "The practice of bringing into the record by bill of exceptions pleadings on papers which the court has refused to allow is not known to the Federal courts in equity cases." Ibid. 329, 330. In this case the party was permitted to have certified to the appellate court a rejected document not as a part of the record, but for the information of the court.

The judges of the Federal courts in chancery act upon the rule that they are not required to certify to a bill of exceptions in equity. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 177; *Morrison v. Burnette*, 83 C. C. A. 391, 154 Fed. 617; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 369; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas. Co.* 91 C. C. A. 196, 165 Fed. 162; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243. The Court of appeals cannot remodel a defective bill of exceptions. *Murphy v. Milford, A. & W. Street R. Co.* 126 C. C. A. 649, 210 Fed. 135.

Thus, where exceptions are taken to the admission of evidence during the progress of an equity cause, they must be entered at the time and become incorporated into the record, and objections made to any proceedings must be noted at the time made, and so appear in the record, and not in the form of a separate bill of exceptions. New rule 46, Supreme Court rule 13; circuit court of appeals rule 12; *Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 113 Fed. 264; *Goodwin v. Fox*, 129 U. S. 630, 32 L. ed. 815, 9 Sup. Ct. Rep. 567; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 179; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 369. If the exceptions do not thus appear, the objections will be considered waived. *Ibid.*; *Potter v. United States*, 58 C. C. A. 231, 122 Fed. 55 and cases cited; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243; *Massenberg v. Denison*, 46 C. C. A. 120, 107 Fed. 18; *Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co.* 103 Fed. 39; *Fayerweather v. Ritch*, 89 Fed. 529; *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 877; *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 274; *Michigan Ins. Bank v. Eldred*, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 450; *Blease v. Garlington*, 92 U. S. 4-7, 23 L. ed. 522, 523; *Adee v. J. L. Mott Iron Works*, 46 Fed. 39. (See "Assignment of Error to the Admission or Rejection of Evidence," chapter 108.)

An exception to the rule may be found in a case where some issue has been sent to a jury for trial. There a bill of exceptions to admission of evidence must be taken and preserved and incorporated in the record. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 333.

CHAPTER CVIII.

PROCEEDINGS AFTER TRANSCRIPT DELIVERED.

Filing Transcript.

It is the duty of the appellant to file the transcript with the clerk of the appellate court on or before the return day, whether it falls in vacation or term. On failure to comply with the rule the defendant, or appellee, may have the case docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court in which the decree was rendered, stating the case and certifying that an appeal had been duly sued out and allowed. In no case shall the appellant be entitled to docket the case after the same has been dismissed on certificate, unless by order of the court. Circuit court of appeals rule 16.

It will be seen, by the terms of this rule, that the time in which the transcript is to be filed is directory, as it provides for an enlargement of the time for good cause shown upon application to the judge signing the citation, or to any judge of the court of appeals, in whose sound discretion relief, if needed, lies. *Florida v. Charlotte Harbor Phosphate Co.* 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. 883; *Jones v. Mann*, 18 C. C. A. 442, 25 U. S. App. 700, 72 Fed. 85; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 880; *Sparrow v. Strong*, 3 Wall. 103, 18 L. ed. 49, 2 Mor. Min. Rep. 320; *West Chicago Street R. Co. v. Ellsworth*, 23 C. C. A. 393, 46 U. S. App. 603, 77 Fed. 665; *Re Alden Electric Co.* 59 C. C. A. 509, 123 Fed. 415; See *Hill v. Chicago & E. R. Co.* 140 U. S. 53, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; and *Gwin v. Breedlove*, 15 Pet. 285, 10 L. ed. 741. The order extending the time,

when obtained, must be filed with the clerk of the court of appeals. Circuit court of appeals rule 16.

An order enlarging the time, signed by a district judge who did not sign the citation, would be void unless he was at the time sitting as a member of the circuit court of appeals. *West v. Irwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

An application to enlarge the time may be applied for after the time has elapsed to file the record, where it had been filed and docketed before the motion to dismiss was made (*West Chicago Street R. Co. v. Ellworth*, 77 Fed. 664; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 150; *Re Alden Electric Co.* 59 C. C. A. 509, 123 Fed. 415; *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 879; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; *Bingham v. Morris*, 7 Cranch, 99, 3 L. ed. 281; *Equitable Life Assur. Soc. v. Tolbert*, 76 C. C. A. 212, 145 Fed. 339, and cases cited); and so when both made simultaneously. *Owings v. Tiernan*, 10 Pet. 24, 9 L. ed. 333.

Waiver of Irregularity in Filing Transcript.

A general appearance of appellee waives defects (*Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849), and defendant moving for new bond waives the transcript not being filed and docketed in time (*Waldron v. Waldron*, 156 U. S. 378, 39 L. ed. 457, 15 Sup. Ct. Rep. 383).

Docketing Case.

By rule 9 of the Supreme Court and rule 16 of the circuit court of appeals it is made the duty of appellant to docket the case by or before the return day, whether in vacation or term time, unless for good cause shown the time be enlarged by the judge signing the citation, or by one of the judges of the circuit court of appeals.

A failure to docket the case in time gives appellee the opportunity of dismissing the case on certificate as in cases when the transcript has not been filed. See "Filing Transcript."

Upon docketing the case the appearance of counsel for the party docketing must be entered, and counsel for appellee

should notify the clerk to enter his appearance. Briefs will not be received from counsel who have not entered an appearance, and to enter an appearance counsel must be enrolled as members of the bar of the court in which the case is docketed. Circuit court of appeals rule 7.

By circuit court of appeals rule 17, the clerk docket the case in chronological order, and in its time it is placed on the trial docket, the record is ordered printed (circuit court of appeals rule 23), and it is assigned for a particular day for argument, of which the clerk gives timely notice. See amended rules fifth circuit, rule 35.

Certificate of Clerk Necessary to Dismiss Appeal.

The *certificate* of the clerk below as a basis for dismissal is imperative; it will be required though the appellant has deposited a transcript in the circuit court of appeals, where the defendant seeks to docket and dismiss. *Macomb v. Armstead*, 10 Pet. 407, 9 L. ed. 473; see also *West v. Brashear*, 12 Pet. 101, 9 L. ed. 1016. It must state the case and certify that an appeal has been sued out and allowed. *United States v. Gomez*, 23 How. 326, 16 L. ed. 552.

The certificate must be regular, and the names of all the parties to the record must be distinctly set forth. *Smith v. Clark*, 12 How. 22, 13 L. ed. 876; *Holliday v. Batson*, 4 How. 645, 11 L. ed. 1140.

The filing of a certified copy of the record in the court of appeals would be sufficient. *United States v. Fremont*, 18 How. 36, 15 L. ed. 302.

Printing Record.

The appellant is required, at least six days before the case is called for argument, to have printed and file with the clerk twenty copies of the record, unless a different order is made by the court upon application. Circuit court of appeals rule 23. The appellant must furnish three copies of the printed record to adverse counsel at least six days before the argument. In printing the record counsel may stipulate as to what parts of the record shall be printed, and that it shall be heard on the record as printed.

If the record is not printed when the case is reached in the regular call of the docket, you may move to dismiss it. *Lem Hing Dun v. United States*, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145.

The clerk of the appellate court attends to the printing of the record and its preparation for hearing, at the expense of the appellant; the amount, however, is taxed as costs against the losing party. Circuit court of appeals rule 23.

By rule 23 of the fifth circuit the clerk makes an estimate of the printing, notifying the party docketing of the cost. If he does not pay the amount in a reasonable time, then the clerk notifies the adverse party, and he may pay it. If neither party pays, and it is not printed when reached on call, it will be dismissed.

It is made the duty of the clerk to have the record printed when the amount is paid, and to furnish to counsel appearing for both parties three copies each of the printed record. At least twenty-five copies of the record must be printed, and the cost of printing is finally taxed up against the losing party, or as directed by the court.

Diminution of the Record.

Presumptively the transcript filed is correct (*Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23), but if the transcript be defective in that something has been omitted or improperly copied (circuit court of appeals rule 18), then the practice is to suggest a diminution of the record, and have the omitted part or defective record properly certified up. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245; *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932; *Chappell v. United States*, 160 U. S. 506, 40 L. ed. 512, 16 Sup. Ct. Rep. 397; *Merrill v. Floyd*, 2 C. C. A. 58, 5 U. S. App. 90, 50 Fed. 849; *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1; *Hoskin v. Fisher*, 125 U. S. 217-224, 31 L. ed. 759-762, 8 Sup. Ct. Rep. 834; *Missouri, K. & T. R. Co. v. Dinsmore*, 108 U. S. 31, 27 L. ed. 640, 2 Sup. Ct. Rep. 9; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 42; *Florida C. R. Co. v. Schutte*, 100 U. S. 644, 25 L. ed. 605. New rule 76.

The proceeding cannot be used as a writ of error, but only as auxiliary to bring up a full record. *Ibid.* American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; Travis County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 693; Re Tampa Suburban R. Co. 168 U. S. 587, 42 L. ed. 590, 18 Sup. Ct. Rep. 177.

The suggestion of a diminution of the record must be made by motion in the appellate court. Circuit court of appeals rule 18; Supreme Court rule 14. The motion must be made at the *first* term of the entry of the case, unless upon special cause shown to the court; and the motion must state the facts upon which the application is founded, and be verified by affidavit if not admitted by the other party. *Chappell v. United States*, 160 U. S. 506, 40 L. ed. 512, 16 Sup. Ct. Rep. 397.

It seems that where a necessary part of the record that has been omitted was presented with the motion, it may be admitted without certiorari, if certified to by the clerk below. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168. Mere clerical errors in transcript on certificate may be amended by the court. *Hudgins v. Kemp*, 18 How. 534, 15 L. ed. 512.

CHAPTER CIX.

DISMISSING APPEALS.

The transcript being properly filed, the next inquiry of the appellee is as to whether any cause exists to dismiss the appeal.

There are many causes stated in the rules, and I will briefly enumerate them.

First. The appellant may dismiss with leave of the court. *Donallan v. Tannage Patent Co.* 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385; *United States v. Griffith*, 141 U. S. 212, 35 L. ed. 719, 11 Sup. Ct. Rep. 1105; *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 963, 964.

Second. When the appellant and appellee shall, in vacation by their counsel, sign and file an agreement with the clerk, in writing, directing the case to be dismissed, the clerk may enter the order. Supreme Court rule 28; circuit court of appeals rule 20.

Third. A failure to file a transcript in the appellate court and docket the cause on or before the return day of the citation is a ground of dismissal. Supreme Court rule 9; circuit court of appeals rule 16; *Wong Sang v. United States*, 75 C. C. A. 383, 144 Fed. 968; see *The Kawailani*, 63 C. C. A. 347, 128 Fed. 879. Unless excused. *Toledo Metal Wheel Co. v. Foyer Bros. & Co.* 138 C. C. A. 612, 223 Fed. 350.

Fourth. When no counsel appears or brief is filed for appellant at the time the case is called for trial. Circuit court of appeals rule 22; *Lem Hing Dun v. United States*, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145; Supreme Court rule 16.

Fifth. When a case is reached in regular order and neither party has entered an appearance. Circuit court of appeals rule 22, sec. 3; Supreme Court rule 18.

Sixth. Failure of counsel for appellant to have the record printed by the time the case is reached on regular call. Circuit court of appeals rule 23; Supreme Court rule 10, sec. 2.

Seventh. Failure of appellant to file with the clerk of the court of appeals at least six days before the day assigned for argument twenty copies of a printed brief. Circuit court of appeals rule 24, sec. 5; Supreme Court rule 21, sec. 5.

Eighth. When representatives of the deceased appellant are cited and do not appear within sixty days, the appellee may have the appeal dismissed. Circuit court of appeals rule 19, sec. 1.

Ninth. An appeal will be dismissed when the parties have settled their differences and the further prosecution is collusive. *Benner v. Hayes*, 26 C. C. A. 271, 53 U. S. App. 376, 80 Fed. 953; *Weaver v. Kelly*, 34 C. C. A. 423, 92 Fed. 421; *United States v. Elliott*, 74 Fed. 94; *Mills v. Green*, 159 U. S. 654, 40 L. ed. 294, 16 Sup. Ct. Rep. 132; *Thorp v. Bonnifield*, 177 U. S. 19, 44 L. ed. 653, 20 Sup. Ct. Rep. 559; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.* 145 U. S. 301, 36 L. ed. 712, 12 Sup. Ct. Rep. 921. Or when there is no material issue. *Ibid.*; *Allen v. Georgia*, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525. Or when the question is moot, or some abstract proposition. *Kimball v. Kimball*, 174 U. S. 162, 43 L. ed. 934, 19 Sup. Ct. Rep. 639; *United States v. Evans*, 213 U. S. 297, 53 L. ed. 803, 29 Sup. Ct. Rep. 507; *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132. Or where relief becomes impossible. *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; *Katz v. San Antonio*, 34 C. C. A. 10, 63 U. S. App. 452, 91 Fed. 567; *Gamewell Fire Alarm Teleg. Co. v. Municipal Signal Co.* 23 C. C. A. 250, 33 U. S. App. 714, 77 Fed. 492; *Lockwood v. Wickes*, 21 C. C. A. 257, 36 U. S. App. 321, 40 U. S. App. 136, 75 Fed. 123. As when statutes repealed. *Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321, 161 U. S. 103, 40 L. ed. 632, 16 Sup. Ct. Rep. 492. And may hear evidence as to dismissal. *Ridge v. Manker*, 67 C. C. A. 596, 132 Fed. 599-601, and cases cited. *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665.

Tenth. An appeal will be dismissed if no citation is sued out, or sued out and not served (*Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed.

728); but the regular appearance of appellee waives it (*Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849).

Eleventh. An appeal will be dismissed when based on grounds affecting the jurisdiction of the court *a quo*, or the jurisdiction of the appellate court (*Gorman Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 363-365; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449-453, 44 L. ed. 842-844, 20 Sup. Ct. Rep. 690), as when the appeal was not sued out within the time limited (*Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 284).

Twelfth. When decree joint, and appeal by one without notice to others. *Fitzpatrick v. Graham*, 56 C. C. A. 95, 119 Fed. 353 and cases cited.

Thirteenth. When no assignment of errors or brief. *Moline Trust & Sav. Bank v. Wiley*, 79 C. C. A. 446, 149 Fed. 734; *Fitch v. Richardson*, 77 C. C. A. 422, 147 Fed. 196.

Motion to Dismiss.

By circuit court of appeals rule 21, sec. 3, all motions must be reduced to writing and contain a brief statement of the facts and objects of the motion; and no motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel, of the motion and time of hearing. Supreme Court rule 6, sec. 3.

In the Supreme Court the time of service is three weeks before the day of submission, and with the notice of the motion must be furnished a copy of the brief or argument to be served on opposite counsel. *Carey v. Houston & T. C. R. Co.* 150 U. S. 179, 37 L. ed. 1043, 14 Sup. Ct. Rep. 63

The Supreme Court will not hear motions to dismiss appeals before the record is printed, if there is any question about the facts upon which the motion is based (*St. Louis Nat. Bank v. United States Ins. Co.* 100 U. S. 43, 25 L. ed. 547); but it is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 542, 5 U. S. App. 97, 51 Fed. 931; *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. ed. 406, 6 Sup. Ct. Rep. 39.

Again, in the Supreme Court the hearing is by brief and

not oral argument, unless invited. Supreme Court rule 6, sec. 4; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63. If oral argument is desired, counsel will be notified, and it will be heard in connection with the hearing on the merits.

In the circuit court of appeals the motion may be heard at such time as the court will indicate, and one hour to each side is given to argue motions. Circuit court of appeals rule 21, sec. 2.

The motion must contain within itself the statement of the facts upon which the motion is based, and after one motion has been filed no other can be filed except by permission of the court. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 54, 25 U. S. App. 97, 51 Fed. 931, S. C. 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 238.

Motion to Dismiss.

A. B., Appellant, }
vs. }
C. D., Appellee. }

In the Circuit Court of Appeals for
the.....Circuit, at.....

Motion to Dismiss.

And now comes appellee and moves the court to dismiss the appeal filed herein and for cause shows:

First. That it appears that said appeal was not sued out within six months, etc.

Second. Because, etc.

R. F.,
Solicitor.

Have the following notice served:

Title as in case appealed.

Please take notice that I have filed a motion to dismiss the appeal taken in this cause, a copy of which is attached to this notice, and that on theday of....., A. D. 19..., or as soon thereafter as counsel can be heard, I will submit the same to the Honorable Circuit Court of Appeals at.....for decision.

R. F.,
Solicitor.

Effect of Death on the Appeal.

Section 9 of the judiciary act of 1875 provides that when either party to a final decree dies, or shall die before the time

allowed for taking an appeal has expired, it shall not be necessary to revive the suit by any formal proceedings. The representative of such deceased party may file in the clerk's office a duly certified copy of his appointment and thereupon may enter an appeal. If the party in whose favor the decree is entered dies before appeal taken, notice to his representatives from the appellate court shall be given as provided in case of death after appeal taken. *Dolan v. Jennings*, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584.

Supreme Court rule 15 provides that if either party shall die *pending* the appeal, the representative may voluntarily come in and be admitted a party to the appeal. If they do not voluntarily come in the other party may suggest the death on the record, and thereupon obtain, on motion, an order that unless such representatives shall become parties within the first *ten* days of the *ensuing* term, the party moving, if defendant, will have the appeal dismissed, and if appellant he shall be entitled to open the record and have on hearing the judgment reversed if it be erroneous; provided, that a copy of such order shall be published in a newspaper of general circulation within the State or district from which the case is brought for three successive weeks and at least sixty days before the beginning of the term of the appellate court next ensuing.

Section 2 of the rule provides that if the representative of the party does not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel an appearance, the case shall abate.

Section 3 provides that when either party desires to sue out an appeal, and the other party is dead and has no representative in the jurisdiction so that the suit cannot be revived, but the deceased has a representative in another State, the party may have the judgment stayed and procure the appeal; but he must, within thirty days from the commencement of the term to which the appeal is returnable, make a suggestion in the appellate court, supported by affidavit, setting up that the party was dead when the appeal was taken and had no representative within the jurisdiction of the court so that the suit could not be revived, but that the party has a representative in another State or Territory (setting forth where specifically).

Upon this suggestion he may obtain an order that unless

such representatives shall appear within *ten* days after the commencement of the next ensuing term the appellant can open the record and have the decree reversed, if erroneous. But the appellant must have a citation issued reciting the substance of the order, which must be served on the representative at least sixty days before the beginning of the next term of the appellate court.

Rule 19 of the circuit court of appeals is to the same effect, with the exception of certain changes, to which I will call your attention.

First. Rule 19 of the circuit court of appeals provides that a party may suggest the death on the record, and, on motion, obtain an order that unless the representative shall become a party within sixty days, instead of within ten days after the next ensuing term, as in the Supreme Court rule, the party moving for such order, if defendant or appellee, shall have the right to have the appeal dismissed; and if appellant, he shall be entitled to open the record and proceed; provided, however, that a copy of every such order be served personally on the representative at last thirty days before the expiration of such sixty days, instead of being published in a newspaper, as required in the Supreme Court rule.

Again, the third section of circuit court of appeals rule 19 requires the appellant to file his suggestion of death within thirty days from filing the record in the circuit court of appeals, instead of within thirty days after the commencement of the term to which the appeal is returnable.

Again, circuit court of appeals rule 19, sec. 3, requires the representative to make himself a party within ninety days from the date of the order, instead of within ten days after the beginning of the next ensuing term, as in the Supreme Court rule.

Again, in the circuit court of appeals rule the service is to be made on the representative at least thirty days before the expiration of the ninety days, instead of sixty days before the next ensuing term, as in the Supreme Court rule.

Again, by the circuit court of appeals rule the representative is required to appear within ten days after the ninety days has expired, instead of being required to appear by the tenth day of the next ensuing term, as in the Supreme Court rule.

(See "Parties Dying after Decree," chapter 112), see, as to abating appeal by death, *Mills v. Green*, 159 U. S. 655, 40 L. ed. 294, 16 Sup. Ct. Rep. 132; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 703, 38 L. ed. 322, 14 Sup. Ct. Rep. 533. As to form of suggestion, see *Howth v. Owens*, 30 Fed. 910. As to order permitting representatives to be made parties, see *Edmonson v. Bloomshire*, 7 Wall. 307, 19 L. ed. 91.

Costs on Appeal.

The bond is liable for costs of the court below, as well as the court of appeals. *Expanded Metal Co. v. Bradford*, 177 Fed. 604; *The Joseph B. Thomas*, 158 Fed. 559; *Jennings v. Burton*, 177 Fed. 603.

CHAPTER CX.

SUBMITTING THE CASE TO THE APPELLATE COURT.

We have seen that the record must be printed in order to be submitted, and copies furnished counsel.

Briefs.

The case may be submitted on briefs alone, or on briefs and oral argument. The briefs must be printed and filed by the appellant at least six days before the case is called for argument. He must file with the clerk of the court of appeals twenty copies, at least, for the use of the court and counsel, one copy being sent, on application, to each of the counsel on the opposite side. If in the Supreme Court, he must file six days at least before the case is called for argument twenty-five copies of his brief, one copy of which shall, on application, be furnished to each of the counsel engaged on the opposite side.

The counsel for *appellee* shall file with the clerk of the circuit court of appeals twenty copies of his printed brief at least three days before the case is called for argument, and if in the Supreme Court he must file twenty-five copies at least three days prior to the case being called for argument. Supreme Court rule 21; circuit court of appeals rule 24; Wisconsin, *M. & P. R. Co. v. Jacobson*, 179 U. S. 294, note 1, 45 L. ed. 197, 21 Sup. Ct. Rep. 115; *Milwaukee v. Shailer & S. Co.* 34 C. C. A. 112, 91 Fed. 858.

The form and order of statement in the brief are fully set forth in Supreme Court rule 21 and circuit court of appeals rule 24. *Ibid.*; *Lincoln v. Sun Vapor Street Light Co.* 8 C. C. A. 253, 19 U. S. App. 431, 59 Fed. 756; *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 877; *Balliet v. United States*, 64 C. C. A. 201, 129 Fed. 693.

The brief must set forth the assignment of errors relied upon (*Haldane v. United States*, 16 C. C. A. 447, 32 U. S. App.

607, 69 Fed. 819), and unless the error in the record is flagrant it will not be noticed if not assigned in the brief. *Repauno Chemical Co. v. Victor Hardware Co.* 42 C. C. A. 106, 101 Fed. 948; circuit court of appeals rule 24, sec. 4; Supreme Court rule 21, sec. 4; *Ibid.*; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 558, 559; *Moline Trust & Sav. Bank v. Wylie*, 79 C. C. A. 446, 149 Fed. 734, and cases cited; *Chicago G. W. R. Co. v. Egan*, 86 C. C. A. 230, 159 Fed. 46; *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688; *Mitchell v. Marker*, 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 140; *McClellan v. Pyeatt*, 1 C. C. A. 613, 4 U. S. App. 319, 50 Fed. 686; *Sovereign Camp, W. W. v. Jackson*, 38 C. C. A. 208, 97 Fed. 382; *Western Assur. Co. v. Polk*, 44 C. C. A. 104, 104 Fed. 649.

Circuit court of appeals rule No. 23, regulating the printing of the record and filing and serving briefs, does not necessarily entail the dismissal of an appeal without regard to the merits, but additional time will not be allowed where only delay would arise. *Matsumura v. Higgins*, 109 C. C. A. 431, 187 Fed. 601.

Rule 24 of circuit court of appeals, requiring counsel for plaintiff to serve a copy of printed brief at least ten days before the case is called for argument, was held sufficiently complied with in *Russo-Chinese Bank v. National Bank*, 109 C. C. A. 398, 187 Fed. 80.

Scandal in briefs will be penalized. *Kelley v. Boettcher*, 27 C. C. A. 177, 49 U. S. App. 620, 82 Fed. 794; *Green v. Elbert*, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188.

Form and Size.

The form and size of printed briefs are controlled by circuit court of appeals rule 26 and Supreme Court rule 31.

Not Filed.

A brief will not be filed if counsel has not entered an appearance, and counsel must be enrolled as a member of the bar of that court.

Oral Argument.

Oral argument, if desired, will be heard on the day the case is set for hearing, and is controlled by circuit court of appeals rule 25 and Supreme Court rule 22. It will be seen that in the Supreme Court two hours are allowed to each side, while in the circuit court of appeals the time varies. In the fifth circuit, by an amendment adopted February 27, 1894, to rule 24, one hour to open and one half hour to reply is allowed to appellant, and one hour to appellee.

Rules Applied When Cause Called for Hearing.

When no counsel appears, and no brief has been filed for appellant, defendant may have plaintiff called, and on failure to answer, the appeal may be dismissed (rule 22, sec. 1; *Fitch v. Richardson*, 77 C. C. A. 422, 147 Fed. 196; *Portland Co. v. United States*, 15 Wall. 2, 21 L. ed. 113; *Ryan v. Koch*, 17 Wall. 19, 21 L. ed. 611); and by Supreme Court rule 16 he may, instead of dismissing the case, have it opened and affirmed.

If defendant fails to appear when the case is called, the court may permit the appellant to proceed. Circuit court of appeals rule 22, sec. 2; Supreme Court rule 17.

When neither party has appeared the case is dismissed at the cost of appellant. Circuit court of appeals rule 22, sec. 3; Supreme Court rule 18.

By Supreme Court rule 19, if a case is called at two successive terms, and neither party is ready for argument, it will be dismissed at the cost of the appellant unless cause shown for further postponement.

Amendments Allowed in Appellate Court.

We have already referred to proceeding by certiorari when the record is defective; but I will briefly refer to amendments permitted to cure defects in a record properly certified, and, first, as to *amendments to show jurisdiction*. Equity rule 19.

A defective allegation of citizenship may be amended in the

appellate court by consent of both parties, but in the absence of such consent the judgment will be reversed to allow an amendment in accordance with the facts, but only to submit that issue. U. S. Rev. Stat. sec. 954 (Comp. Stat. 1913, sec. 1591); circuit court of appeals rule 11, secs. 1 and 3; Preferred Acci. Ins. Co. v. Barker, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814; Houston v. Filer & S. Co. 43 C. C. A. 457, 104 Fed. 164; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; Fred Macey Co. v. Macey, 68 C. C. A. 363, 135 Fed. 729; United States v. Hopewell, 2 C. C. A. 510, 5 U. S. App. 137, 51 Fed. 798. As to motion to amend, see Post v. Beacon Vacuum Pump & Electrical Co. 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 3. See Parker Washington Co. v. Cramer, 120 C. C. A. 216, 201 Fed. 878. See Act. Mch. 3, 1915, proceeding for amendment in appellate courts to show diversity of citizenship.

Amendments to cure defective pleadings touching the merits of the case will not be allowed; but where equity requires it, or justifies it, the case will be remanded to the lower court with permission to make the amendments, otherwise it cannot be done after the decision in the appellate court. *Ibid.*; Post v. Beacon Vacuum Pump & Electrical Co. 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 6; Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 413, 415, 35 L. ed. 1061, 1062, 12 Sup. Ct. Rep. 188. See Re Gamewell Fire-Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 911, 912.

Such amendment in the lower court must be based on a petition, or motion in the appellate court, for permission to apply to the court below to make the amendments, and when granted, the appellate court should order that the petitioner should have permission to apply to the court below to file further pleadings in pursuance of the suggested amendment. *Ibid.* But an amendment which seeks to set up a new or additional cause of action will not be allowed. *Martin & H. Cash-Carrier Co. v. Martin*, 18 C. C. A. 234, 33 U. S. App. 373, 71 Fed. 519; *American Bell Teleph. Co. v. United States*, 15 C. C. A. 569, 33 U. S. App. 236, 68 Fed. 542. See *McNulta v. West Chicago Park*, 39 C. C. A. 545, 99 Fed. 328, amending by making new bond and bringing in new parties.

Defective Procedure.

If there is any failure on the mere procedure to perfect the appeal, you may apply to the appellate court to have it perfected. Thus, if it be in mere matters of form, or names which can be cured by the record, the appellate court will permit the amendment if in furtherance of justice and not prejudicial to the adverse party (U. S. Rev. Stat. sec. 1005, Comp. Stat. 1913, sec. 1664); *Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 218; *Estis v. Trabue*, 128 U. S. 228, 32 L. ed. 438, 9 Sup. Ct. Rep. 58; *Walton v. Marietta Chair Co.* 157 U. S. 347, 39 L. ed. 727, 15 Sup. Ct. Rep. 626; *United States v. Schoverling*, 146 U. S. 82, 36 L. ed. 895, 13 Sup. Ct. Rep. 24. See *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 729), or a mere clerical error in the transcript (*Hudgins v. Kemp*, 18 How. 530, 15 L. ed. 511); but if some necessary step to give the court jurisdiction is not apparent in the record, as where no allowance of appeal is shown in the records of the court below, or in the transcript, though in fact the appeal was allowed, the proper practice is not by certiorari, but by motion for permission to apply to the court below to enter the allowance of the appeal *nunc pro tunc*, and then have the entry certified up (*Chicago v. Bigelow*, 131 U. S. xciii. Appx. and 19 L. ed. 257). But if the allowance of appeal was noted, and not certified in transcript, then certiorari applies. See "Diminution of Record."

Rules Applied in Considering Cases on Appeal.

Assuming the appeal is perfected, there are certain rules evolved out of the cases which are applied by appellate courts to which I will call your attention.

First. The first and fundamental question is that of the jurisdiction of the appellate court, and of the court from which the appeal came; and this question the court is bound to ask itself, whether suggested or not. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Continental Nat. Bank v. Burford*, 191 U. S. 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Giles v. Teasley*, 193 U. S. 146, 48 L. ed. 655, 24 Sup.

Ct. Rep. 359; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 13; *Central Grain & Stock Exchange v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 463; *Puget Sound Nav. Co. v. Lavender*, 84 C. C. A. 259, 156 Fed. 361; *Yeandle v. Pennsylvania R. Co.* 95 C. C. A. 282, 169 Fed. 939; *McGilvra v. Ross*, 90 C. C. A. 398, 164 Fed. 604; *Gorman-Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 363; *Grace v. American Cent. Ins. Co.* 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 386, 28 L. ed. 465, 4 Sup. Ct. Rep. 510. And the same rule applies in removals. *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 725-729.

Second. In equity cases the appellate court considers the whole case, both fact and law. *Waterloo Min. Co. v. Doe*, 27 C. C. A. 504, 8 U. S. App. 411, 82 Fed. 51, 19 Mor. Min. Rep. 1, and cases cited; *Carson v. Combe*, 29 C. C. A. 660, 52 U. S. App. 622, 86 Fed. 210.

Third. The decree entered when the evidence is conflicting is presumptively correct. *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 88, and cases cited; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243; *North American Exploration Co. v. Adams*, 104 Fed. 404, 12 Mor. Min. Rep. 65; *Daugherty v. Bogy*, 44 C. C. A. 266, 104 Fed. 938; *United States v. Marshall*, 127 C. C. A. 231, 210 Fed. 595-597 and cases cited.

Fourth. The presumption is that error has produced prejudice, and it is only when it is clearly apparent that no prejudice was suffered by the error that the appellate court will refuse to reverse. *Choctaw O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *United States v. Gentry*, 55 C. C. A. 658, 119 Fed. 75 and cases cited.

Fifth. Finding of court below in equity suits not conclusive. U. S. Rev. Stat. sec. 1012 (Comp. Stat. 1913, sec. 1673); *Hendryx v. Perkins*, 59 C. C. A. 266, 123 Fed. 268.

Sixth. Case must be a real case. *Jones v. Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; *American Book Co. v. Kansas*, 193 U. S. 52, 48 L. ed. 614, 24 Sup. Ct. Rep. 397; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132. What may be heard on second appeal. *Olsen v. North Pacific Lumber Co.* 55 C. C. A. 665, 119 Fed. 77.

Seventh. Material prejudice must appear, to reverse the case. Equity rule 46.

Rehearing.

Rule 29 of the circuit court of appeals provides for rehearing, and the time within which to be filed. See Appendix. It is not granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court grants it, and at same term of court (The Comforts, 23 Blatchf. 371, 32 Fed. 327); but this requirement is for the protection of the court, and may be waived. *Burget v. Robinson*, 59 C. C. A. 260, 123 Fed. 262; *Kirchberger v. American Acetylene Burner Co.* 73 C. C. A. 387, 142 Fed. 169; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; *Wright v. Gorman-Wright Co.* 81 C. C. A. 534, 152 Fed. 408; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809. (See "Rehearing," chapter 93 and "Bill of Review," chapter 94.)

The petition for.—The petition for rehearing must conform to CC. rule 29. 31 C. C. A. clxvii, 47 Fed. xiii.; *Hinds v. Keith*, 6 C. C. A. 231, 13 U. S. App. 222, 314, 57 Fed. 11; *The Dago*, 63 Fed. 182; *Kirchberger v. American Acetylene Burner Co.* 73 C. C. A. 387, 142 Fed. 169.

Filing; as to time.

Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26 L. ed. 91; *Bushnell v. Crooke Min. & Smelt. Co.* 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2; *Allen v. Wilson*, 21 Fed. 884; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 146, 104 Fed. 710; *Re Ives*, 51 C. C. A. 541, 113 Fed. 913; *Reynolds v. Manhattan Trust Co.* 48 C. C. A. 249, 109 Fed. 99; *United States v. 1,621 Pounds of Fur Clippings*, 45 C. C. A. 263, 106 Fed. 163.

Cannot introduce new question.—*Merriman v. Chicago & E. I. R. Co.* 14 C. C. A. 36, 24 U. S. App. 641, 66 Fed. 663; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 839; *Moffet v. Quine*, 95 Fed. 199; *United States v. Hall*, 11 C. C. A. 294, 298, 21 U. S. App. 402, 426, 63 Fed. 472.

CHAPTER CXI.

APPEAL FROM CIRCUIT COURT OF APPEALS TO SUPREME COURT.

The Supreme Court exercises appellate jurisdiction over the circuit court of appeals. *Southern R. Co. v. Postal Telegr. Cable Co.* 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249. By section 6 of the act of 1891, as we have already seen, the circuit court of appeals may certify to the Supreme Court at any time any questions or propositions of law in any case within its appellate jurisdiction, whether its jurisdiction be by the statute final or not; and the Supreme Court may answer the questions certified, or may order up the entire record, and decide the whole case as if originally brought before it on writ of error or appeal. *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 900; *Dickinson v. United States*, 98 C. C. A. 516, 174 Fed. 808; *Henningsen v. United States Fidelity & G. Co.* 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389.

Again, the Supreme Court may, by certiorari or otherwise, order up any case before the circuit court of appeals in which such court, under the act of 1891, has final appellate jurisdiction.

Again, in all cases not made final in the circuit court of appeals there is of right an appeal, by writ of error, to the Supreme Court when the matter in controversy shall exceed one thousand dollars besides costs, and if sued within *one* year after the entry of the decree. There is no right of appeal when cases made final in circuit court of appeals. Act 1891, sec. 6. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; *MacKenzie v. Pease*, 77 C. C. A. 233, 146 Fed. 743. See *Huff v. Bidwell*, 103 C. C. A. 520, 180 Fed. 374.

We then have four ways by which the Supreme Court may exercise appellate jurisdiction over the circuit court of appeals.

First. It may decide the legal question certified.

Second. It may order the whole record up and decide the case. Supreme Court rule 37; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; *Lau Ow Bew v. United States*, 144 U. S. 58, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

Third. In any case where the jurisdiction of the circuit court of appeals is final it may require it to be certified up. *Ibid.* See *Quinlan v. Green County*, 205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505.

Fourth. It may review, by appeal, any decree of the circuit court of appeals not made final in said court. *Ibid.*

Review by Certifying Questions by Court of Appeals to Supreme Court.

Any question in any case within the appellate jurisdiction of the circuit court of appeals may be certified by it for its instruction, and when answered, such answers are binding on the circuit court of appeals. Act of 1891, sec. 6. See sec. 239, new Code, chap. 10 (Comp. Stat. 1913, sec. 1216).

The form of the certificate is very simple, and requires that the questions should be introduced by a brief statement of the case and so much of the facts as are pertinent and necessary to understand the questions propounded. The questions must be purely of law, and not mixed questions of law and fact (*Emsheimer v. New Orleans*, 186 U. S. 42, 46 L. ed. 1046, 22 Sup. Ct. Rep. 770; *Chicago B. & Q. R. Co. v. Williams*, 205 U. S. 444-453, 51 L. ed. 875-878, 27 Sup. Ct. Rep. 559; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *German Ins. Co. v. Hearne*, 55 C. C. A. 84, 118 Fed. 134; *United States v. Union P. R. Co.* 168 U. S. 505-512, 42 L. ed. 559-561, 18 Sup. Ct. Rep. 167, and cases cited; *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Felsenheld v. United States*, 186 U. S. 134, 46 L. ed. 1089, 22 Sup. Ct. Rep. 740), and should be certified in cases only of grave doubt (*Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765, and cases cited; *Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; Supreme Court

rule 37). It must be pertinent and necessary to the decision of the particular case, and not abstract questions which may or not be applicable.

It cannot certify the whole case, but must be distinct points of law. *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 453, 51 L. ed. 878, 27 Sup. Ct. Rep. 559; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *United States v. Union P. R. Co.* 168 U. S. 505, 48 L. ed. 559, 18 Sup. Ct. Rep. 167; *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Cross v. Evans*, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733; *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *Columbus Watch Co. v. Robbins*, 148 U. S. 266-269, 37 L. ed. 445, 446, 13 Sup. Ct. Rep. 594; see *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 56, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370. The certification of a question of law is discretionary with the circuit court of appeals. *Louisville, N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 1; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765; *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774; *Dickinson v. United States*, 98 C. C. A. 516, 174 Fed. 808. Rules governing certification under this act are governed by rules laid down in respect of certificates of division under U. S. Rev. Stat. secs. 652, 693; *United States v. Union P. R. Co.* 168 U. S. 512, 42 L. ed. 561, 18 Sup. Ct. Rep. 167.

All of the judges of the court of appeals must sign the certificate, and cannot certify on *motion* if point is not doubtful. *German Ins. Co. v. Hearne*, 55 C. C. A. 84, 118 Fed. 134.

May Order Up Entire Record.

The Supreme Court, instead of answering the questions, may, of its own motion, order up the entire record, and decide the whole matter in controversy as if brought originally before them. But in view of the sixth section of the act of 1891, it promulgated rule 37, the second clause of which provides that if application is made to this court that the whole record be sent up for its consideration, the party making said application

shall, as a part thereof, furnish this court with a certified copy of the whole of said record. This clearly contemplates that the court will only order up the entire case upon application accompanied with a full record (*Lau Ow Bew v. United States*, 144 U. S. 58, 36 L. ed. 344, 12 Sup. Ct. Rep. 517), but the case must be of sufficient gravity and importance to invoke such action (*Re Lau Ow Bew*, 141 U. S. 586, 587, 35 L. ed. 869, 870, 12 Sup. Ct. Rep. 43; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765; *Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; *Re Woods*, 143 U. S. 205, 36 L. ed. 126, 12 Sup. Ct. Rep. 417).

By Certiorari.

By certiorari all cases may be ordered up which are made final in the circuit court of appeals. *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 364; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

The act of 1891, section 6, provides, among other things, for a revision by the Supreme Court, by certiorari or otherwise, of any case made final in the circuit court of appeals, and it is competent to order the case up, whether its advice is requested or not, except those that may be brought up by appeal or error. *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493. The power thus given is not affected by the stage or condition of the case as it exists in the court of appeals when the application for certiorari is made. It may be exercised before or after the decision of the circuit court of appeals, but the right may be lost by delay. *The Conqueror*, 166 U. S. 113, 114, 41 L. ed. 939, 940, 17 Sup. Ct. Rep. 510. See sec. 239, new Code (Comp. Stat. 1913, sec. 1216), embodying sec. 6, act of 1891.

The Supreme Court has acted with much caution in granting writs of certiorari under the conditions mentioned, but, while exercising its power sparingly, it will issue the writ when

there are in issue questions of great public concern, or matters of gravity and importance (Re Lau Ow Bew, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43), as when there is a conflict between a State supreme court and the circuit court of appeals as to large property rights (Forsyth v. Hammond, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; The Three Friends, 166 U. S. 49, 41 L. ed. 913, 17 Sup. Ct. Rep. 495), and when the matter complained of is important in its immediate effect and far-reaching in its consequences (Re Woods, 143 U. S. 205, 206, 36 L. ed. 126, 12 Sup. Ct. Rep. 417). So where the decision would seriously affect the administration of justice (Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385), or prevent extraordinary embarrassment in the conduct of a cause, it may be granted (American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 384, 37 L. ed. 491, 13 Sup. Ct. Rep. 758).

It may be said of it, that it exists if some great necessity demands it, and though it may be invoked at any stage of the case, yet the Supreme Court will very rarely grant it before a final judgment in the circuit court of appeals.

Petition For.

The certiorari is issued on the petition of a party to the suit, which may be as follows:

Title of case to be certified.

To the Honorable Supreme Court of the United States:

The petition of A. B., appellant, etc., respectfully shows to this Honorable Court that he filed in the District Court of the United States for thedistrict of.....a bill in equity on, to wit: the.....day of, A. D., 19... (here state substance of bill and prayer); that said cause was heard and determined and on the.....day of....., A. D. 19..., a decree was entered in said court as follows (insert decree). That thereafter, to wit, on the.....day of....., A. D. 19..., an appeal was allowed and perfected, and on the.....day of.....A. D. 19..., a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the.....circuit, sitting at....., and said cause was entered and docketed in said Court of Appeals, entitled A. B., appellant, vs. C. D., appellee, and numbered.....on said docket.

That the assignment of errors filed in said cause was as follows (here insert assignment of errors).

That afterwards, to wit, on the.....day of....., A. D., 19..., the case came on to be heard in the Circuit Court of Appeals before the Hon., the Hon....., and the Hon....., and on the.....day of....., A. D. 19..., a decree was entered in said cause by the Circuit Court of Appeals of.....circuit as follows (state judgment of affirmance).

Your petitioner is advised that said judgment of the Circuit Court of Appeals, is final, and is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination under the act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

(Here recite the grounds upon which you seek the writ of certiorari, and it must appear that the case comes fully within the statute.)

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the.....circuit, sitting at....., commanding the court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the act of Congress approved March 3, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction; and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as may seem proper.

And your petitioner will ever pray.

Signed by petitioner or by his counsel.

The petition must be verified by the petitioner or by counsel as follows:

If by petitioner: "That he has read the foregoing petition by him subscribed, and the facts stated therein are true to the best of his information and belief."

If by counsel: State the fact of being counsel, and that he knows of the above proceedings had, and "that the facts therein stated are true to the best of his knowledge and belief."

Notice of the Application Must Be Given.

If the writ is granted, the clerk of the United States Supreme Court issues it under the seal of the court, directed to the circuit court of appeals, and commanding it to send up the said cause with the record and proceedings had therein, and that the same be certified and removed to the Supreme Court without delay, so that the Supreme Court may act thereon, as according to law ought to be done.

By rule 37, promulgated by the Supreme Court May 11, 1891, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to the Supreme Court by the applicant as a part of the application.

Time.

A party is entitled to a year within which to sue out the writ, and the fact that the mandate has gone down does not affect the right. *The Conqueror*, 166 U. S. 113, 41 L. ed. 939, 17 Sup. Ct. Rep. 510; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 284, 41 L. ed. 1005, 17 Sup. Ct. Rep. 572; *Ayres v. Polsdorfer*, 187 U. S. 595, 47 L. ed. 318, 23 Sup. Ct. Rep. 196; *Spencer v. Duplan Silk Co.* 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 174. It may be lost by delay. *Ibid.*

Effect of Granting the Writ.

First. When the writ is granted by the Supreme Court it suspends the mandate of the circuit court of appeals, and all action by the circuit court of appeals, as well as of the circuit court from whence the appeal came. It is, in effect, a super-sedeas (*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 78 Fed. 659-662), except that the court below may perfect its judgment or allow a remittitur (*Hovey v. McDonald*, 109 U. S. 157, 27 L. ed. 890, 3 Sup. Ct. Rep. 136).

Second. When the writ is issued the case is before the court for its determination with the same power as if carried up by appeal. Act of 1891, sec. 6; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280-284, 41 L. ed. 1004-1005, 17 Sup. Ct. Rep. 572. But see, *Hubbard v. Tod*, 171 U. S. 494, 43 L. ed. 253, 19 Sup. Ct. Rep. 14. The entire case is before the court for examination. Where an intervener applied for the writ, and the court entertained only errors assigned, and not whether there was error in the decree below of which other parties could have complained.

CHAPTER CXII.

APPELLATE POWER OF SUPREME COURT IN CASES NOT FINAL IN CIRCUIT COURT OF APPEALS.

The Supreme Court may review, by appeal or writ of error, all cases not made final in the circuit court of appeals by the sixth section of the judiciary act of 1891, when the matter in controversy exceeds *one thousand* dollars besides costs, and if taken in one year after the entry of the decree or judgment in the circuit court of appeals. *Huguley Mfg. Co. v. Galetton Cotton Mills*, see appendix sec. 6, act 1891, 184 U. S. 294, 46 L. ed. 547, 22 Sup. St. Rep. 452. See sec. 241, chap. 10, new Code (Comp. Stat. 1913, sec. 1218), embodying the old law.

So, then, we have in all cases decided by the circuit court of appeals in which the jurisdiction was not dependent on diversity of citizenship entirely, or between aliens and citizens, or where the case arose under the patent, revenue, or admiralty laws, or in bankruptcy proceedings where the amount in controversy is under two thousand dollars, or judgments in arbitration claims (U. S. Stat. at L. vol. 30, p. 426; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 41 L. ed. 368, 17 Sup. Ct. Rep. 40), a right of appeal to the Supreme Court from the decree of the circuit court of appeals, *provided only* that the matter in controversy exceeds one thousand dollars in value or amount besides costs, and that the appeal to be taken within *one year* from the entry of the decree. *Northern P. R. Co. v. Amato*, 144 U. S. 472, 36 L. ed. 509, 12 Sup. Ct. Rep. 740. The statutory amount must be in the controversy, but the fact may be shown by affidavit. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540; *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806.

By enumerating the conditions in the act of 1891, under which the decrees in the circuit court of appeal are made final,

and declaring that all cases *not* made final in the circuit court of appeals may be carried as of right to the Supreme Court on appeal or error, much of the difficulty is removed in determining whether a case decided in the court of appeals can be taken by appeal or error, or must be taken by certiorari.

In determining the question of the finality of the judgment in the circuit court of appeals we must go back to the jurisdiction of the circuit court, and when that rests upon diversity of citizenship *alone*, or between aliens and citizens, or the case has been brought under the patent or revenue laws, or is a case in admiralty, then the decision of the circuit court of appeals is final and appeal or error to the Supreme Court would not lie. *Harding v. Hart*, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 846; *Spencer v. Duplan Silk Co.* 191 U. S. 527, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 111, 41 L. ed. 368, 369, 17 Sup. Ct. Rep. 40; *Ayres v. Polsdorfer*, 187 U. S. 588-595, 47 L. ed. 315-318, 23 Sup. Ct. Rep. 196; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 294, 46 L. ed. 547, 22 Sup. Ct. Rep. 452; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222. However, an appeal would lie when the case is between a foreign state and citizens of one of the United States, as it is not within the statute.

It may, then, be stated that under the act of March 3, 1891, where the jurisdiction of the circuit court of appeals was based on diversity of citizenship, or any of the grounds mentioned in section 6 of the act which have been referred to above, there can be no review by appeal or error by the Supreme Court of the judgment or decree of the circuit court of appeals in such cases. And this would be true, though after jurisdiction had attached in the circuit court issues are raised and decided bringing the case within either of the clauses set forth in section 5 of the act of 1891, and by virtue of which the case could have been carried direct to the Supreme Court, but was not, but carried to the circuit court of appeals. See authorities above; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 280, 45 L. ed. 861, 21 Sup. Ct. Rep. 646; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174;

Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Watkins v. King, 55 C. C. A. 290, 118 Fed. 532; Loeb v. Columbia Twp. 179 U. S. 479, 45 L. ed. 285, 21 Sup. Ct. Rep. 174. Cannot be two appeals. Ibid.; Robinson v. Caldwell, 165 U. S. 362, 41 L. ed. 746, 17 Sup. Ct. Rep. 343.

If, however, the jurisdiction of the circuit court rests upon diversity of citizenship and a Federal question when the suit is begun, and appears in the pleading in due and logical form, and the case is carried to the circuit court of appeals, and judgment entered in said court, then such judgment would not be final, and an appeal or error would lie to the Supreme Court from the circuit court of appeals' judgment. Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Loeb v. Columbia Twp. 179 U. S. 480, 481, 45 L. ed. 286, 287, 21 Sup. Ct. Rep. 174; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 315, 46 L. ed. 925, 22 Sup. Ct. Rep. 662; Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527; Empire State-Idaho Min. & Developing Co. v. Hanley, 198 U. S. 292, 49 L. ed. 1053, 25 Sup. Ct. Rep. 691; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Union P. R. Co. v. Harris, 158 U. S. 328, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; Press Pub. Co. v. Monroe, 164 U. S. 110, 111, 41 L. ed. 368, 17 Sup. Ct. Rep. 40.

Not final unless depending wholly on diversity. Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 576, 23 Sup. Ct. Rep. 365.

In Montana Min. Co. v. St. Louis Min. & Mill. Co. 186 U. S. 24, 46 L. ed. 1039, 22 Sup. Ct. Rep. 744, it is said when both parties who have been defeated in some part of their contention appeal to the circuit court of appeals, and the judgment is affirmed in favor of one party, and reversed by him as to the contention against him, writs of error from the Supreme Court to review each judgment would not lie, because such judgment is not final so far as the jurisdiction of the Supreme Court is concerned. Covington v. First Nat. Bank, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645.

When the jurisdiction of the circuit court rests wholly upon a Federal question the Supreme Court alone would have ju-

risdiction of an appeal from the circuit court. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 279, 280, 45 L. ed. 860, 861, 21 Sup. Ct. Rep. 646; *Gary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 532; *Huguley v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452.

There are special statutes dealing with special subjects, and making the judgment of the circuit court of appeals final when called upon to review cases arising under such statutes. In all such cases no appeal to the Supreme Court will lie, nor a writ of error, but a revision, if any, must be by certiorari to the circuit court of appeals. For illustration, see bankruptcy act of 1898, sec. 25; U. S. Stat. at L. vol. 30, p. 553, chap. 541, and see also an act concerning carriers in interstate commerce, 1898; U. S. Stat. at L. vol. 30, p. 426, chap. 370, sec. 4 of act.

Petition for Appeal or Writ of Error.

Title of case as appealed.

To the Hon....., Chief Justice, or to Any Associate Justice of the Supreme Court of the United States:

Now comes the (appellant) by his solicitor and complains that in the record and proceedings, and also in the rendition of the decree (or judgment) of the United States Circuit Court of Appeals for the.....circuit, sitting at....., in the State of....., in the above styled and numbered cause, on the.....day of....., A. D. 19..., affirming the decree of the United States District Court for the.....district of..... in said cause, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the Circuit Court of the United States for the.....district of.....depended upon the fact (that the railroad company defendant was a corporation created by an act of Congress, or any other ground of jurisdiction other than where the jurisdiction of the Circuit Court of Appeals is made final); that the amount involved therein and the matter in controversy exceeds the sum of one thousand dollars besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

R. F.,
Solicitor.

Appeal and supersedeas allowed, and bond fixed in the sum of..... dollars, conditioned as the laws directs, this the.....day of..... A. D. 19...

Associate Justice Supreme Court, etc.

The appeal may be allowed by any of the justices of the Supreme Court or any of the judges of the court of appeals.

In the matter of authority to issue writs of error from the Supreme Court to the circuit court of appeals it was held in *Re Issuing Writs of Error*, 117 C. C. A. 603, 199 Fed. 115 that it should be issued by the clerk of the Supreme Court, or the clerk of the circuit court of appeals. U. S. Rev. Stat. sec. 1004, as amended Jan. 22, 1912, 37 Stat. at L. 54, chap. 12 (Comp. Stat. 1913, sec. 1663).

Assignment of Errors.

With this petition should be filed an assignment of errors, in form as before given.

When the appeal is allowed the clerk, as stated above, issues the writ, and the petition and assignment of errors and bond, when approved, are filed with the clerk of the circuit court of appeals. Notice of appeal is issued and the clerk incorporates certified copies of these proceedings with the record and proceedings in the cause before the circuit court of appeals, duly certifies the transcript, and forwards to the clerk of the Supreme Court of the United States.

Forms given heretofore for the proceedings in appeals from the circuit court to the circuit court of appeals may be used, the difference being as to time within which the appeal is taken being *one year* from the circuit court of appeals to the Supreme Court.

An appeal from the circuit court of appeals to the Supreme Court in cases of bankruptcy is provided for in sec. 252, new Code (Comp. Stat. 1913, sec. 1229), effective January 1st, 1912. See 4th sec. act Jan. 18th, 1915, providing that the judgments and decrees in bankruptcy shall be final in circuit court of appeals, except that the Supreme Court may by certiorari review the judgment or decree, provided a petition is filed in three months from the date of the judgment, etc.,—for that purpose.

CHAPTER CXIII.

APPEAL FROM STATE COURTS TO THE UNITED STATES SUPREME COURT.

I discussed incidentally, under "Federal Questions," appeals from the highest State court to the Supreme Court of the United States. We saw in chapter 26, that by U. S. Rev. Stat. sec. 709, a *final* judgment or decree in any suit in the highest court of a State wherein is drawn in question the validity of a statute or treaty, or authority exercised under the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution of the United States, its treaties, or laws, and the decision is in *favor of their validity*; or when any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the *title, right, privilege, or immunity* specially set up or claimed by either party under such treaty, statute, commission, or authority,—may be re-examined and reversed or affirmed in the Supreme Court upon *writ of error* (see sec. 709, chapter 26). *Mutual L. Ins. Co. v. McGraw*, 188 U. S. 291, 47 L. ed. 480, 23 L.R.A. 33, 23 Sup. St. Rep. 375; *Western U. Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *Keerl v. Montana*, 213 U. S. 135, 53 L. ed. 734, 29 Sup. Ct. Rep. 469; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 Ann. Cas. 692; *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 789; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 492, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194. U. S. Rev. Stat. sec. 709, is embodied in sec. 237 of the new Code, chap. 10 (Comp. Stat. 1913, sec. 1214).

By U. S. Rev. Stat. sec. 1003 (Comp. Stat. 1913, sec. 1662),

it is provided that writs of error from the Supreme Court to the State court shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered in a United States court.

By section 5 of the appellate court act of 1891, the appellate jurisdiction of the Supreme Court over State courts of last resort involving a Federal question is not affected by that act; and the statutes governing the exercise of that jurisdiction are sections 709, 710, 1003 of the United States Revised Statutes, and sections 997 to 1013 of the United States Revised Statutes (Comp. Stat. 1913, secs. 1653-1655) governing proceedings on error and appeal.

Having thus referred to the statutes by which writs of error from the Supreme Court to State courts are controlled, I will, before giving the necessary forms and substance of the statutes governing practice in such cases, state certain rules which have been settled by the cases, and which control the Supreme Court in granting the writs of error to State courts. It will be seen by these rules that the object of this jurisdiction is solely to restrain unconstitutional legislation, and not to correct errors. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Remington Paper Co. v. Watson*, 173 U. S. 451, 43 L. ed. 764, 19 Sup. Ct. Rep. 456.

First. It need not be the decision of the *Supreme Court* of a State, but it will grant a writ of error to any court of last resort in the State having jurisdiction to determine the case. Thus, if by a State statute any inferior court is authorized to finally determine the case, a writ of error will be issued to that court; or when the highest State tribunal refuses to review a case from an inferior court the writ of error will be directed to the inferior court. *Bacon v. Texas*, 163 U. S. 215, 41 L. ed. 135, 16 Sup. Ct. Rep. 1023; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215.

Second. In order to sustain the jurisdiction of the Federal Supreme Court, it must appear:

(a) That a Federal question is presented, and it is apparent from the record. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 492, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; *Michigan Sugar Co. v. Michigan* (*Michigan Sugar Co. v. Dix*) 185

U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *San Jose Land & Water Co. v. San Jose Ranch Co.* 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; *Fowler v. Lamson*, 164 U. S. 255, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Kipley v. Illinois*, 170 U. S. 186, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; *Scudder v. Comptroller (Scudder v. Coler)*, 175 U. S. 36, 44 L. ed. 63, 20 Sup. Ct. Rep. 26; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 68, 43 L. ed. 368, 19 Sup. Ct. Rep. 97; *Zadig v. Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Levy v. Superior Ct.* 167 U. S. 177, 42 L. ed. 126, 17 Sup. Ct. Rep. 769. It cannot be supplied by an assignment of errors. *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

(b) That a decision was made thereon, or that such a question must have arisen and been necessarily involved (*Ibid.*; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247, and cases cited; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Powell v. Brunswick County*, 150 U. S. 433-440, 37 L. ed. 1134-1137, 14 Sup. Ct. Rep. 166; *Fowler v. Lamson*, 164 U. S. 255, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *McQuade v. Trenton*, 172 U. S. 639-640, 43 L. ed. 582, 19 Sup. Ct. Rep. 292; *Sayward v. Denny*, 158 U. S. 184, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Castillo v. McConnico*, 168 U. S. 679, 42 L. ed. 624, 18 Sup. Ct. Rep. 229; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 48, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; *Allen v. Southern P. R. Co.* 173 U. S. 489, 43 L. ed. 778, 19 Sup. Ct. Rep. 518; *Schlemmer v. Buffalo R. & P. R. Co.* 205 U. S. 1, 2, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Bachtel v. Wilson*, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; see *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 67, 46 L. ed. 86, 87, 22 Sup. Ct. Rep. 26), in the case, and the decision as made comes within the provisions of the United States Revised Statutes, sec. 709 (*Northern P. R. Co. v. Ellis*, 144 U. S. 464,

36 L. ed. 506, 12 Sup. Ct. Rep. 724; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941; 12 Sup. Ct. Rep. 41; *Powell v. Brunswick County*, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; *Rogers v. Jones*, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635). The decision must be against the Federal question. *Baker v. Baldwin*, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; *Kizer v. Texarkana & Ft. S. R. Co.* 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 193, 53 L. ed. 964, 29 Sup. Ct. Rep. 546; *Eustis v. Bolles*, 150 U. S. 361-366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131. However, when the case arises under the third section of U. S. Rev. Stat. sec. 709, where a right, title, privilege, or immunity is claimed, there can be no inference from the case that it was involved; it must be specifically set up and must be claimed by the plaintiff in error, and not a third person. *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Braxton County Ct. v. West Virginia*, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275; *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *F. G. Oxley Stave Co. v. Butler County* 166 U. S. 658, 41 L. ed. 1152, 17 Sup. Ct. Rep. 709; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 14, 45 L. ed. 404, 21 Sup. Ct. Rep. 240; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 193, 53 L. ed. 964, 29 Sup. Ct. Rep. 546.

(c) A bare averment of a Federal question is not sufficient. *Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914, 29 Sup. Ct. Rep. 580; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 87, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; *St. Louis, G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 483, 39 L. ed. 504, 15 Sup. Ct. Rep. 443; *Clarke v. McDade*, 165 U. S. 173, 41 L. ed. 674, 17 Sup. Ct. Rep. 284; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 11; *Fayerweather v. Ritch*, 195 U. S. 299, 49 L. ed. 210, 25 Sup. Ct. Rep. 58; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; *New York C. & H. R. R. Co. v. New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

(d) It must be a real, not fictitious, Federal question. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 182; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*), 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; *Swing v. Western Lumber Co.* 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. Rep. 497; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

Third. It must appear that, though the Federal question was raised, the decision was not, or could not have been, made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the Federal question. *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Rogers v. Jones*, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Bacon v. Texas*, 163 U. S. 227, 41 L. ed. 139, 16 Sup. Ct. Rep. 1023; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 576, 40 L. ed. 540, 16 Sup. Ct. Rep. 389; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Delaware City S. & P. S. B. Nav. Co. v. Reybold*, 142 U. S. 643, 35 L. ed. 1144, 12 Sup. Ct. Rep. 290; *O'Neil v. Vermont*, 144 U. S. 336, 36 L. ed. 457, 12 Sup. Ct. Rep. 693; *New York C. & H. R. R. Co. v. New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Fourth. When it appears the State decision was correct, regardless of the Federal question, jurisdiction will not attach. *Hammond v. Johnston*, 142 U. S. 78, 35 L. ed. 942, 12 Sup. Ct. Rep. 141.

Fifth. The Federal question must be raised in the original pleadings and not in the proceedings after the State court's judgment (*Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; *McCorquodale v. Texas*, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; *Meyer v. Richmond*, 172 U. S. 92, 43 L. ed. 377, 19 Sup. Ct. Rep. 106; *Loeber v. Schröder*, 149 U. S. 585, 37 L. ed. 859, 13 Sup. Ct. Rep. 934; *Turner v. Richardson*, 180 U. S. 87,

45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Zadig v. Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 848, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Miller v. Cornwall R. Co.* 168 U. S. 133, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Sayward v. Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Burt v. Smith*, 203 U. S. 129, 51 L. ed. 121, 27 Sup. Ct. Rep. 37; *Osborne v. Clark*, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319; *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176), and by plaintiff or defendant. But since the rule of the Supreme Court was promulgated requiring opinions of the court below to be sent up with the record, it is held sufficient to give jurisdiction if the Federal question is fully considered in the opinion of the State court and ruled against the plaintiff in error. *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 179, 180, 47 L. ed. 766, 768, 23 Sup. Ct. Rep. 487; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 69, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 127, 48 L. ed. 376, 24 Sup. Ct. Rep. 221. Thus, it is said that, though a Federal right is not set up in the original petition or earlier proceedings, yet if it clearly appear from the opinion of the State court that a Federal question was in issue and was actually decided against the Federal claim, and such decision was essential to the judgment, then the Supreme Court would re-examine the case. *Ibid.*; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

In *Weber v. Rogan*, 188 U. S. 14, 47 L. ed. 365, 23 Sup. Ct. Rep. 263, it is decided that a Federal question is raised too

late where it is first suggested in an application for a rehearing, citing *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Eastern Bldg. & L. Asso. v. Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *McCorquodale v. Texas*, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 146; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; *Forbes v. State Council*, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295.

But in *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241, it was held that a Federal question raised by an application for rehearing is not too late when that court proceeds to discuss the Federal question in denying the application. *McCorquodale v. Texas*, 211 U. S. 437, 53 L. ed. 269, 29 Sup. Ct. Rep. 146, and cases cited. *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *McKay v. Kalyton*, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215.

And in *Rothschild v. Knight*, 184 U. S. 339, 46 L. ed. 579, 22 Sup. Ct. Rep. 391, it is said that where the Federal question was raised on writ of error to the supreme court of the State, it would be sufficient, citing several cases (*Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 193, 50 L. ed. 149, 26 Sup. Ct. Rep. 41; see *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438); but not where raised for the first time in a petition for rehearing to the State supreme court (*Kansas City Star Co. v. Julian*, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406).

Sixth. It must appear that the Federal question was presented, distinctly ruled upon, and denied. *Fowler v. Lamson*, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 112; *Western U. Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; *Eustis v. Bolles*, 150 U. S. 362, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *Powell*

v. Brunswick County, 150 U. S. 439, 440, 37 L. ed. 1136, 1137, 14 Sup. Ct. Rep. 166; Harrison v. Morton, 171 U. S. 47, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix), 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581. And the fact that the State court declared no Federal question exists does not affect the right to a writ of error. Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446. Where the State court declines to pass on the Federal question, the issue is not so raised as to give the Supreme Court jurisdiction (Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 11, 51 L. ed. 685, 27 Sup. Ct. Rep. 407), when it is not set up in the original pleadings; but if set up in the pleadings, then the refusal of the court to pass upon it would not oust the jurisdiction, where there was a fair ground for asserting the Federal question (New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691).

Illustrative cases: Yates v. Jones Nat. Bank, 206 U. S. 167, 51 L. ed. 1009, 27 Sup. Ct. Rep. 638, and cases cited; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384; St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Jacobs v. Marks, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 67, 46 L. ed. 87, 22 Sup. Ct. Rep. 26; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Williams v. First Nat. Bank, 216 U. S. 582, 54 L. ed. 625, 30 Sup. Ct. Rep. 441, held to involve a Federal question supporting the writ of error and California Powder Works v. Davis, S. Eq.—48.

151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; *Mobile Transp. Co. v. Mobile*, 187 U. S. 480, 47 L. ed. 267, 23 Sup. Ct. Rep. 170; *Johnson v. New York L. Ins. Co.* 187 U. S. 492, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; *Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 52 L. ed. 1080, 28 Sup. Ct. Rep. 732; *Elder v. Wood*, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; *Vandalia R. Co. v. Indiana*, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; *Elder v. Colorado*, 204 U. S. 85, 51 L. ed. 381, 27 Sup. Ct. Rep. 223; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; *Stone v. Southern Illinois & M. Bridge Co.* 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; *Smith v. Jennings*, 206 U. S. 276, 51 L. ed. 1061, 27 Sup. Ct. Rep. 610; *Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; *Williams v. First Nat. Bank*, 216 U. S. 582, 54 L. ed. 625, 30 Sup. Ct. Rep. 441,—held not to present a Federal question.

The alleged error of a State court in not following the law of another State raises no Federal question. *Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 50; see *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

Seventh. A writ of error goes only to a *final* judgment of the State court (*McKnight v. James*, 155 U. S. 687, 39 L. ed. 311, 15 Sup. Ct. Rep. 248; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 341, 40 L. ed. 992, 16 Sup. Ct. Rep. 850); not orders of a judge in chambers (*Lambert v. Barrett*, 157 U.

S. 700, 39 L. ed. 866, 15 Sup. Ct. Rep. 722; Ex parte Jacobi, 104 Fed. 681).

PROCEDURE.

Time Within Which to Sue Out Writ.

By U. S. Rev. Stat. sec. 1008 (Comp. Stat. 1913, sec. 1649), a writ of error must be sued out within two years after the judgment of the State court, except when the party is under disability of infancy, insanity, or imprisonment, then two years from the removal of the disability.

Amount Involved.

Where a decision of a State court involves any of the questions indicated in section 709 of the United States Revised Statutes, as given above, the Supreme Court may revise by writ of error the decision of the State court of last resort, without any reference to the amount involved. The Habana, 175 U. S. 683, 684, 44 L. ed. 322, 323, 20 Sup. Ct. Rep. 290. It is the Federal question that gives jurisdiction under section 709, and not the value of the subject-matter; and here I will call your attention to amount and value as an element in the appellate jurisdiction of the Supreme Court, and the changes that have been made in the history of that court as to amount as a controlling factor in its jurisdiction. Kirby v. American Soda Fountain Co. 194 U. S. 144, 48 L. ed. 912, 24 Sup. Ct. Rep. 619.

Effect of Amount on Appellate Jurisdiction of the Supreme Court.

For a century after the organization of the government the judiciary acts imposed pecuniary limits on appellate jurisdiction. The Habana, 175 U. S. 680, 44 L. ed. 321, 20 Sup. Ct. Rep. 290. For a long time it was fixed at two thousand dollars, and in 1875 it was raised to five thousand dollars. In 1889 it was provided (25 Stat. at L. p. 693, chap. 236), that when the judgment or decree did not exceed five thousand

dollars the Supreme Court would have appellate jurisdiction on an issue of jurisdiction in the circuit court of the United States, and upon that issue only; but if the amount of the decree exceeded five thousand dollars, then the Supreme Court could decide all the issues in the case on the merits. *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Tupper v. Wise*, 110 U. S. 398, 28 L. ed. 189, 4 Sup. Ct. Rep. 26; *Gibson v. Shufeldt*, 122 U. S. 38, 30 L. ed. 1087, 7 Sup. Ct. Rep. 1066.

Thus stood the law until 1891, when it was changed by the act of March 3d of that year. This act created a new and complete scheme of appellate jurisdiction (see 26 Stat. at L. 826, chap. 517), and under this act the appellate jurisdiction of the Supreme Court was made to rest rather on the nature of the case than on the amount involved.

As the appellate jurisdiction of the Supreme Court now stands, you may appeal from the circuit courts of the United States on a question of jurisdiction direct to the Supreme Court without reference to amount. *The Habana*, 175 U. S. 682, 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290; *Kirby v. American Soda Fountain Co.* 194 U. S. 144, 48 L. ed. 912, 24 Sup. Ct. Rep. 619.

In *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, the repealing clause of the act of 1891 was held to remove any question of amount as affecting jurisdiction, and sections 692 and 695 of the United States Revised Statutes were held repealed by implication.

In appeals by writ of error from the Supreme Court of the United States to the State court of last resort, no amount is required to give jurisdiction under section 709 of the United States Revised Statutes authorizing the writ to issue. *The Habana*, 175 U. S. 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290.

In appeals from the circuit court of appeals to the Supreme Court of the United States the act of 1891 imposes a pecuniary limit of one thousand dollars in all cases not made final in the circuit court of appeals; that is, in order to appeal in this class of cases, the amount involved must exceed one thousand dollars besides costs. And if this should not appear in the record you may supply it by affidavits. (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540; *Whitside v. Haselton*, 110 U. S.

297, 28 L. ed. 153, 4 Sup. Ct. Rep. 1; Rector v. Lipscomb, 141 U. S. 557, 35 L. ed. 857, 12 Sup. Ct. Rep. 83), which may be rebutted by counter-affidavits (Ibid.); but in determining amount, if the judgment is against the plaintiff, the amount in good faith claimed should control, but if the judgment be against the defendant then the amount of the judgment must control (Gorman v. Havird, 141 U. S. 208, 35 L. ed. 718, 11 Sup. Ct. Rep. 943; J. P. Jorgenson Co. v. Rapp, 85 C. C. A. 364, 157 Fed. 738; New Mexico v. Atchison, T. & S. F. R. Co. 201 U. S. 41, 50 L. ed. 651, 26 Sup. Ct. Rep. 386), unless there be a counterclaim disallowed (Buckstaff v. Russell & Co. 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448).

In the bankrupt act of July 1, 1898, an appeal to the Supreme Court from the circuit court of appeals is allowed if the amount in controversy, in the allowance or rejection of a claim, exceeds two thousand dollars and a Federal question is involved; otherwise the judgment of the circuit court of appeals is final and the question can only be taken to the Supreme Court by certiorari. 30 Stat. at L. 553, chap. 541.

PRACTICE IN APPEALS.

Practice.

By U. S. Rev. Stat. sec. 1003 (Comp. Stat. 1913, sec. 1662), writs of error from the Supreme Court to the State court of last resort are issued and prosecuted in the same manner and are to have the same effect as if the judgment or decree appealed from was rendered in the United States court. U. S. Rev. Stat. sec. 709.

So, then, bearing in mind the conditions above stated, and this statute, you may prepare your petition for the writ of error as follows:

Petition for Writ.

A. B. }
vs. } In Equity.
C. D. }

In the Supreme Court of the United
States, Term,
A. D., 19...

To the Honorable....., Chief Justice of the Supreme Court of the
United States, and the Associate Justices of said Court:

Now comes A. B., plaintiff in the above cause, and would show unto this

Honorable Court that in the record and proceedings, and rendition of the decree in the above cause by the Supreme Court of the State of....., it being the highest court of said State in which a decision could be had on the said suit between A. B. and C. D., manifest error has occurred, greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question (the validity of the statute, or a treaty, or an authority exercised under the United States, and the decision was against their validity), or (the validity of a statute or an authority exercised under said State on the ground of repugnancy to the constitution, laws or treaties of the United States, and the decision was in favor of the validity of the law of the State), or (there was drawn in question the construction of a clause of the constitution, or of a treaty, or statute or commission held under the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause, treaty, statute or commission) (the Federal question particularly involved in your case being specially stated, then proceed); all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

R. F.,
Solicitor.

By Whom Citation Signed and Appeal Allowed.

By section 999, U. S. Rev. Stat. (Comp. Stat. 1913, sec. 1659), it is provided that when a writ of error is issued to a State court the citation shall be signed by the chief justice, judge or chancellor of the State court in which judgment was rendered, or by a justice of the Supreme Court of the United States, and at least thirty days' notice given. *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792; *Palmer v. Donner*, 7 Wall. 541, 19 L. ed. 99; *Twitchell v. Pennsylvania*, 7 Wall. 324, 19 L. ed. 223; *Haynor v. New York*, 170 U. S. 410, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631; *Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Butler v. Gage*, 138 U. S. 56, 34 L. ed. 871, 11 Sup. Ct. Rep. 235. It may be allowed by any of the judicial officers above named (*Ibid.*; *Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730; *Ald-*

rich v. *Ætna Ins. Co.* 8 Wall. 495, 19 L. ed. 475; *Ex parte Chadwick*, 159 Fed. 576; *Haynor v. New York*, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631), but only by those named. Thus where the Supreme Court of a State was composed of a chief justice and three associate justices, a writ allowed by an associate justice will be dismissed. It must be allowed by the chief justice (see authorities above; *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792; *Northwestern Union Packet Co. v. Home Ins. Co.* 154 U. S. 588, and 20 L. ed. 463, 14 Sup. Ct. Rep. 1168); but in the absence of the chief justice the presiding justice may act, it being shown that he was acting as chief justice (*Ibid.*; *Butler v. Gage*, 138 U. S. 56, 34 L. ed. 871, 11 Sup. Ct. Rep. 235; *Missouri Valley Land Co. v. Wiese*, 208 U. S. 234, 52 L. ed. 463, 28 Sup. Ct. Rep. 294).

So the judge, chancellor, or presiding judge of any inferior State court of last resort in the particular case may allow the writ and sign the citation.

The allowance is essential to the jurisdiction of the Supreme Court. *Gleason v. Florida*, 9 Wall. 783, 19 L. ed. 731; *Northwestern Union Packet Co. v. Home Ins. Co.* 154 U. S. 588, and 20 L. ed. 463, 14 Sup. Ct. Rep. 1168. It is not a matter of right. *Twitchell v. Pennsylvania*, 7 Wall. 324, 19 L. ed. 223.

The petition must be accompanied with an assignment of errors (see form of assignment), and when made to a justice of the Supreme Court of the United States it must be accompanied with a complete record from the State court, so that the justice to whom the application is made may ascertain whether a question cognizable on appeal was made and decided in the proper State court, and whether the face of the record will justify the allowance of the writ. *Ibid.*

Order of Allowance.

Title as in bill.

Court where allowed.

On this the.....day of....., A. D. 19..., came on to be heard the application of A. B., plaintiff (or the defendant), said plaintiff being represented by counsel, for a writ of error, and it appearing to the court from the petition filed herein, and the record filed therewith, that the

application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff giving bond, conditioned as the law directs, in the sum of..... dollars (which may operate as a supersedeas; if so, add it), and that a true copy of the record, assignment of errors and all proceedings had in the case in the.....court of.....shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said court may inspect the same and do what according to law should be done.

However, a formal order is not necessary if the citation is signed, and the writ of error is endorsed, allowed as seen in form hereafter given.

The court upon the application may grant the writ of error, and if to the State supreme court from the Supreme Court of the United States, the following form may be used:

The President of the United States to the Honorable Judges of the Supreme Court of the State of....., or to the Presiding Judge or Chancellor of the.....Court of the State of....., etc.—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said court before you, or some of you, between (state parties), your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question (here state any of the grounds indicated in the U. S. Rev. Stat. § 907, authorizing the writ), and the decision was against the validity (or in favor of the validity), etc., and there being manifest error in said decision greatly to the damage of A. B., the petitioner in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the.....day of....., A. D. 19..., in the Supreme Court to be then and there held, that the record may be inspected by said court and justice done.

Witness the Hon....., Chief Justice of the Supreme Court, the.....day of....., in the year of our Lord 19...

[SEAL.] Clerk of the Supreme Court of the United States.

Allowed on....., giving bond according to law in the sum of.....dollars.

L. M.

Justice of the Supreme Court.

The same form may be used when granted by the chief justice of the State court or judge or chancellor finally deciding the case. The writ is a writ of the Supreme Court of the United States without reference to who issues it, and whoever allows it and issues the citation, but exercises an authority vested by Congress in him concurrently with each of the justices of the Supreme Court (*Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Havnor v. New York*, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631; *Gleason v. Florida*, 9 Wall. 783, 19 L. ed. 731; *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792), except that it is directed to the court of last resort deciding the case, instead of the Supreme Court of the State, and is signed by the clerk and endorsed by the judge of the court allowing it: "Allowed, M. F. judge, etc."

Effect of the allowance and Certificate of a Judge or Chancellor of a State Court.

While a chief justice, judge, or chancellor of a State court may allow the writ, yet certifying such allowance, and the grounds for it, cannot supply the want of evidence in the record that a Federal question which would authorize the writ under U. S. Rev. Stat. sec. 709, did exist. *Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Louisville & N. R. Co. v. Smith H. & Co.* 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401; *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; *Allen v. Arguimban*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 42, 45 L. ed. 415, 416, 21 Sup. Ct. Rep. 256.

The office of such certification is not to originate a Federal question, but to make it more specific and certain. *Ibid.*; *Parmelee v. Lawrence*, 11 Wall. 39, 20 L. ed. 49; *Newport Light Co. v. Newport*, 151 U. S. 537, 38 L. ed. 262, 14 Sup. Ct. Rep. 429; *Yazoo & M. Valley R. Co. v. Adams*. 180

U. S. 48, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; *Hulbert v. Chicago*, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

The Supreme Court must determine for itself from the record whether a Federal question is involved (*Powell v. Brunswick County*, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; *Newport Light Co. v. Newport*, 151 U. S. 537, 38 L. ed. 262, 14 Sup. Ct. Rep. 429; *Moore v. Mississippi*, 21 Wall. 638, 639, 22 L. ed. 653, 654; *Walker v. Villavaso*, 6 Wall. 128, 18 L. ed. 854), and the writ of error must be dismissed if no Federal question appears. *Onondaga Nation v. Thatcher*, 189 U. S. 309-311, 47 L. ed. 827, 828, 23 Sup. Ct. Rep. 636.

Citation.

By U. S. Rev. Stat. sec. 999, (Comp. Stat. 1913, sec. 1659), when the writ is allowed a citation shall be signed by the justice or judge granting the writ, *Insurance Co. v. Mordecai*, 21 How. 195, 202, 16 L. ed. 94, 96, and admonishing the defendant in error to be and appear before the Supreme Court of the United States to be holden at the city of Washington, D. C., on the.....day ofA. D. 19...., next (See Supreme Court rule 8, sec. 5, as when to be made returnable), pursuant to a writ of error filed in the office of the (court in which filed) wherein A. B. was plaintiff and you were defendant, that you may answer why the judgment rendered against A. B., the plaintiff in error, may not be revised and justice done in the premises. It is issued in the name of the President of the United States to the defendant in error, and tested in the name of the Chief Justice of the Supreme Court of the United States, and signed *by the judge allowing the writ of error*.

The service of the citation is necessary to give jurisdiction, unless waived, or a general appearance entered by the defendant in error (*Dayton v. Lash*, 94 U. S. 112, 24 L. ed. 33; *Kitchen v. Randolph*, 93 U. S. 87, 23 L. ed. 810; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 316, 317; *Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849; *Villabolas v. United States*, 6 How. 90, 12 L. ed. 356); but service on the attorney

of record is sufficient (*Bigler v. Waller*, 12 Wall. 147, 20 L. ed. 261; *United States v. Curry*, 6 How. 111, 12 L. ed. 365; *Scruggs v. Memphis & C. R. Co.* 131 U. S. civ, and 26 L. ed. 741).

The defendant in error must have thirty days' notice before the first day of the term to which the writ is returnable, or he cannot be compelled to go to a hearing, and the case can only be taken up by consent during that term. *Welsh v. Mandeville*, 5 Cranch, 321, 3 L. ed. 113; *National Bank v. National Bank*, 99 U. S. 609, 25 L. ed. 362.

Bond.

But by U. S. Rev. Stat. sec. 1000, (Comp. Stat. 1913, sec. 1660), every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error or appeal shall prosecute his writ or appeal to effect, and if he fail to make good his plea shall answer all damages and costs (when writ is to be supersedeas) of all costs (when not to act as supersedeas). This bond is to be approved by the judge granting the writ. See form of appeal bond and approval.

When Writ of Error a Supersedeas.

By U. S. Rev. Stat. sec. 1007, (Comp. Stat. 1913, sec. 1666), it is provided that in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error by *lodging* a copy in the clerk's office, where the record remains, within sixty days (Sundays excepted) after the rendering of the judgment complained of, and giving the security required by law on the *issuing of citation*. *Danville v. Brown*, 128 U. S. 504, 32 L. ed. 508, 9 Sup. Ct. Rep. 149; *Danielson v. Northwestern Fuel Co.* 55 Fed. 50.

But if he desires to stay process, he may, having lodged a copy of the writ of error with the clerk as aforesaid, give the security required by law at any time within sixty days after the rendition of such judgment, or even after sixty days, upon application to a justice or judge of the appellate court for a supersedeas.

In such cases, where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days. Therefore, to make a writ of error operate as a supersedeas, it must not only be issued and served, but a copy must be lodged with the clerk for the adverse party, in the office where the *record remains*. *Kitchen v. Randolph*, 93 U. S. 87, 88, 23 L. ed. 810, 811; *Foster v. Kansas*, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 897; *Jabine v. Oates*, 115 Fed. 864; *Sage v. Central R. Co.* 93 U. S. 417, 23 L. ed 935; *Baltimore & O. R. Co. v. Harris*, 7 Wall. 574, 19 L. ed. 100; *O'Dowd v. Russell*, 14 Wall. 405, 20 L. ed. 858 (See chapter 110.)

By the original act of 1789 this was required to be done in *ten* days after rendering judgment and passing the decree complained of, but by act of June, 1872, corrected by act of February 17, 1875, sixty days was allowed. *Boise County v. Gorman*, 19 Wall. 661, 22 L. ed. 226.

You will notice in the latter clause of the act, that in cases where a writ of error may be a supersedeas, that execution shall not issue until ten days expires. *Foster v. Kansas*, *supra*. This means that while you have sixty days within which to obtain a supersedeas, yet after ten days from the rendition of the judgment execution can issue if the supersedeas has not been fixed within the ten days. *Boise County v. Gorman*, *supra*.

The supersedeas when issued will stay further proceedings, but not interfere with executions issued after ten days and before the supersedeas is sued out. *Ibid.*; *Doyle v. Wisconsin*, 94 U. S. 50, 24 L. ed. 64.

Time.

In calculating lapse of time you calculate from the entry of the judgment or decree, not when signed by the judge. *Boise County v. Gorman*, 19 Wall. 665, 22 L. ed. 227; *Providence Rubber Co. v. Goodyear*, 6 Wall. 156, 18 L. ed. 763.

In *Green v. Van Buskirk*, 3 Wall. 448, 18 L. ed. 245, it was held that when judgment is given in a Supreme Court of a State, and the record is returned to an inferior court with an order to enter a judgment there, time affecting the supersedeas runs from the entry of the judgment in the inferior court.

After Sixty Days Cannot Obtain Supersedeas.

Unless a writ of error is sued out or an appeal perfected in sixty days after the entry of a judgment, there is no power in a justice of the appellate court to grant a supersedeas (Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Brown v. Evans, 18 Fed. 56; Western U. Teleg. Co. v. Eyser, 19 Wall. 428, 22 L. ed. 44; Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 935; Texas & P. R. Co. v. Murphy, 111 U. S. 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 497; Peugh v. Davis, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17; Wurts v. Hoagland, 105 U. S. 702, 26 L. ed. 1110; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 397; U. S. Rev. Stat. sec. 1007, Comp. Stat. 1913, sec. 1666; see Foster v. Kansas, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 897); and after citation is signed and security approved the judge of the court below has no jurisdiction to grant it (Draper v. Davis, 102 U. S. 371, 26 L. ed. 122; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 32 Fed. 530); but it seems if the delay was occasioned by the court, and not the fault of the parties, and injustice would be done, a *nunc pro tunc* order can be entered (Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933).

Act Must Be Followed.

A supersedeas is not obtained by virtue of any process issuing from the court, but it follows as matter of law by complying with the act of Congress. Goddard v. Orway, 94 U. S. 673, 24 L. ed. 238; Slaughter-house cases, 10 Wall. 291, 19 L. ed. 920. It is indispensable that the requirements of the acts of Congress be fulfilled. Jabine v. Oates, 115 Fed. 864; Baltimore & O. R. Co. v. Harris, 7 Wall. 574, 19 L. ed. 100; O'Dowd v. Russell, 14 Wall. 405, 20 L. ed. 858; Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 935.

Note that the authorities above given were decided under the original act of 1789 and before 1872, when the amended act extended the time to sixty days for suing out a supersedeas, but the necessity for strictly pursuing the statute decided by these cases applies to the act of 1872.

When Supersedeas Bond Becomes Impaired.

When the security of a supersedeas bond becomes impaired, the Supreme Court may so adjudge it and order additional security; *Williams v. Clafin*, 103 U. S. 753, 754, 26 L. ed. 606, 607; *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516.

CHAPTER CXIV.

MANDATE.

The appellate court may affirm, modify, or reverse any decree or order lawfully brought before it for the review, or may direct such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. Sec. 10, act 1891, (Comp. Stat. 1913, sec. 1670); *Southern Bldg. & L. Asso. v. Carey*, U. S. Rev. Stat. 701, U. S. Comp. Stat. 1901, p. 571; U. S. Rev. Stat. sec. 709; 117 Fed. 328.

How Issued.

The clerk of the appellate court issues the mandate according to the order or decree of the appellate court, and certifies it to the lower court. C. C. A. rule 32 (See Rule of your Circuit; Rule of Supreme Court.)

When Issued.

By Supreme Court rule 24, sec. 5, in dismissal of any suit the clerk is to issue a mandate or other proper process to the court below for its information, and to proceed as required.

By Supreme Court rule 39, 159 U. S. 709, mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless time enlarged by order of the court or a justice thereof in vacation.

Circuit court of appeals rule 32 requires a mandate or other proper process to be issued on the order of the court in order to inform the court below of the proceedings had, and that further proceedings may be had in the court below as to law and justice may appertain (See Rule of your Circuit.)

Executing It.

The mandate is the guide in executing the judgment, and the lower court must follow it and carry the decree into effect. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 328; *Durant v. Essex Co.* (*Durant v. Storrow*), 101 U. S. 555, 25 L. ed. 961; *West v. Brashear*, 14 Pet. 54, 10 L. ed. 351; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; *Great Northern R. Co. v. Western U. Teleg. Co.* 98 C. C. A. 193, 174 Fed. 321; see *Illinois v. Illinois C. R. Co.* 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 300; *Re Washington & G. R. Co.* 140 U. S. 92, 35 L. ed. 340, 11 Sup. Ct. Rep. 673; see *Ex parte First Nat. Bank*, 207 U. S. 66, 52 L. ed. 106, 28 Sup. Ct. Rep. 23. The lower court has nothing to do but execute the mandate. *Ibid.*; *Perkins v. Fourniquet*, 14 How. 330, 14 L. ed. 442; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 549; *Re Sanford Fork & Tool Co.* 160 U. S. 255, 40 L. ed. 416, 16 Sup. Ct. Rep. 291; *Gaines v. Rugg*, 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611; *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 364; *Chapman v. Yellow Poplar Lumber Co.* 32 C. C. A. 402, 61 U. S. App. 499, 89 Fed. 904. The lower court cannot vary it, or examine if for any purpose other than its execution, or give any or further relief, or review it for apparrent error upon any matter decided on appeal, or intermeddle with it further than to settle so much as has been remanded. If in doing so it mistakes or misconceives the order of the appellate court, and does not give effect in full to the mandate, its action may be controlled by appeal or mandamus, as will be hereafter seen. *Ibid.*; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 328; *Livingston v. Story*, 12 Pet. 343, 9 L. ed. 1110; *James v. Central Trust Co.* 47 C. C. A. 374, 108 Fed. 931, and cases cited; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545; *Great Northern R. Co. v. Western U. Teleg. Co.* 98 C. C. A. 193, 174 Fed. 323; *Ouray County v. Geer*, 47 C. C. A. 450, 108 Fed. 480; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *Fellows v. Borden's Condensed*

Milk Co. 188 Fed. 863; Great Northern R. Co. v. Western U. Teleg. Co. 98 C. C. A. 193, 174 Fed. 321.

Effect of Mandate.

The issues in the case are closed, and the decision embodied in the mandate constitutes an adjudication of all questions of law and fact in the case before the court. Omaha Electric Light & P. Co. v. Omaha, 133 C. C. A. 52, 216 Fed. 854; Harrison v. Clarke, 105 C. C. A. 197, 182 Fed. 768, and cases cited; Taenzer & Co. v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543; Ex parte Union S. B. Co. 178 U. S. 319, 44 L. ed. 1084, 20 Sup. Ct. Rep. 944; Mutual L. Ins. Co. v. Hill, 193 U. S. 554, 48 L. ed. 791, 24 Sup. Ct. Rep. 538; Messinger v. Anderson, 96 C. C. A. 445, 171 Fed. 789, 790 and cases cited; Chaffin v. Taylor, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451-456, 42 L. ed. 539-542, 18 Sup. Ct. Rep. 121; Illinois v. Illinois C. R. Co. 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300; Mutual Reserve Fund Life Asso. v. Beatty, 35 C. C. A. 573, 93 Fed. 747; Montana Min. Co. v. St. Louis Min. & Mill. Co. 78 C. C. A. 33, 147 Fed. 897; Orient Ins. Co. v. Leonard, 57 C. C. A. 176, 120 Fed. 808; Patillo v. Allen-West Commission Co. 47 C. C. A. 637, 108 Fed. 723; Illinois ex rel. Hunt v. Illinois C. R. Co. 34 C. C. A. 138, 91 Fed. 955; Re Gamewell Fire-Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Re Potts, 166 U. S. 267, 41 L. ed. 995, 17 Sup. Ct. Rep. 520. When there is no direction to enter any specific decree, but there is only a simple reversal, the effect is to put the case in the same posture as if no decree had been entered, and amendments may be permitted enlarging the issues. Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Hawkins v. Cleveland, C. C. & St. L. R. Co. 39 C. C. A. 538, 99 Fed. 322; See Atlanta K. & N. R. Co. v. Hooper, 44 C. C. A. 586, 105 Fed. 550; Mutual L. Ins. Co. v. Hill, 193 U. S. 553, 48 L. ed. 791, 24 Sup. Ct. Rep. 538. So the court below cannot grant a rehearing, or new trial, or permit a new defense or amendment to the answer, unless the right is reserved in the

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decree of the appellate court, or permission given on application to that court where the case has been considered on its merits. *Re Potts*, 166 U. S. 267, 268, 41 L. ed. 995, 996, 17 Sup. Ct. Rep. 520; *Walker v. Brown*, 86 Fed. 364; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 514, 16 Sup. Ct. Rep. 291; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910; *Hawkins v. Cleveland C. C. & St. L. R. Co.* 39 C. C. A. 538, 99 Fed. 322; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 176; *Ex parte Du-buque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; see *Smale v. Mitchell*, 143 U. S. 99, 36 L. ed. 90, 12 Sup. Ct. Rep. 353. Nor will an appellate court remand a bill to set up new grounds for relief. *Warner v. Godfrey*, 186 U. S. 377, 46 L. ed 1208, 22 Sup. Ct. Rep. 852. A mandate ordering a new trial opens up the entire case; it assumes the same posture as if no decree has been entered, and amendments enlarging the issues and permitting further proof are admissible (*Potts v. Creager*, 71 Fed. 574; *Hawkins v. Cleveland C. C. & St. L. R. Co.* 39 C. C. A. 538, 99 Fed. 324; Citing *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; see *Burnham v. North Chicago Street R. Co.* 32 C. C. A. 64, 60 U. S. App. 225, 88 Fed. 627), except upon issues made and distinctly decided (*Wayne County v. Kennicott*, 94 U. S. 499, 24 L. ed. 260; *Balch v. Haas*, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 976; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518.) So where a case has been considered at length on its merits, and been remanded for further proceedings, the defendant will not be permitted to amend his answer so as to deny a fact affirmatively passed upon and determined by the Appellate court. *Walker v. Brown*, 86 Fed. 364; *Hill v. Mutual L. Ins. Co.* 113 Fed. 44; S. C. 55 C. C. A. 536; 118 Fed. 708; *Brown v. Lanyon Zinc Co.* 102 C. C. A. 497, 179 Fed. 311, and cases cited. Or where it reserves a single question of fact left open to be determined, that question alone can be tried. *Ibid.*; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Illinois ex rel. Hunt v. Illinois C. R. Co.* 34 C. C. A. 138, 91 Fed. 957; S. C. 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300. So where a decree is affirmed, the lower court can only record the decree

and proceed with its execution. *Durant v. Essex Co.* (*Durant v. Storrow*), 101 U. S. 555, 25 L. ed. 961; *Kimberly v. Arms*, 40 Fed. 551; *Re Washington & G. R. Co.* 140 U. S. 96, 35 L. ed. 341, 11 Sup. Ct. Rep. 673; *Mutual L. Ins. Co. v. Hill*, 55 C. C. A. 536, 118 Fed. 711. The effect of the decrees and mandates of the circuit court of appeals is the same as that of the Supreme Court. *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545.

So in second appeals or error, only proceedings subsequent to mandate are carried up, and no inquiry is allowed into original judgment. *Tyler v. Magwire*, 17 Wall. 283, 284, 21 L. ed. 583, 584; *Wayne County v. Kennicott*, 94 U. S. 499, 24 L. ed. 260; *Souer v. De Bary*, 44 C. C. A. 484, 105 Fed. 293; *Texas & P. R. Co. v. Wilder*, 41 C. C. A. 305, 101 Fed. 198, 199, and cases cited.

Issuing Execution.

The appellate court cannot issue execution; if necessary it may be provided for in the mandate. Sec. 10, act 1891, 26 Stat. at L. 829, chap. 517, Comp. Stat. 1913, sec. 1670. The court below must execute the mandate. *Sibbald v. United States*, 12 Pet. 492, 9 L. ed. 1169; *Third Nat. Bank v. Gordon*, 53 Fed. 473; *Tyler v. Magwire*, 17 Wall. 283, 21 L. ed. 583. Where a State court refuses to carry mandate into effect, the Supreme Court may on appeal proceed to a final decision and award execution. *Tyler v. Magwire*, 17 Wall. 290, 21 L. ed. 585; *Stanley v. Schwalby*, 162 U. S. 281, 40 L. ed. 969, 16 Sup. Ct. Rep. 754. New rule 8.

Remedy if the Court Does Not Enforce the Mandate.

It may be by appeal or mandamus.

When by Appeal.

Where the court below errs in construing opinion, the remedy is by appeal. *James v. Central Trust Co.* 47 C. C. A. 374, 108 Fed. 931, and cases cited, but in *Perkins v. Tourniquet*, 14 How. 330, 14 L. ed. 442, it is said you may use

either mandamus or appeal. Re Blake, 175 U. S. 117, 44 L. ed. 95, 20 Sup. Ct. Rep. 42; see Re Westervelt, 39 C. C. A. 350, 98 Fed. 912; Tyler v. Magwire, 17 Wall. 290, 21 L. ed. 585; see Metcalf v. Watertown, 16 C. C. A. 37, 34 U. S. App. 107, 68 Fed. 861.

When by Mandamus.

Where the mandate leaves nothing to the judgment or discretion of the court below, and full effect is not given to the mandate, a mandamus may be applied for. Re Blake, 175 U. S. 117, 44 L. ed. 95, 20 Sup. Ct. Rep. 42; Perkins v. Tourmiquet, 14 How. 330, 14 L. ed. 442; Re Washington & G. R. Co. 140 U. S. 95, 35 L. ed. 341, 11 Sup. Ct. Rep. 673, and cases cited; City Nat. Bank v. Hunter, 152 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; Re City Nat. Bank, 153 U. S. 246, 38 L. ed. 705, 14 Sup. Ct. Rep. 804; Gaines v. Rugg, 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611; Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Ex parte Sawyer, 21 Wall. 235, 22 L. ed. 617; Re Huguley Mfg. Co. 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

In Mason v. Pewabic Min. Co. 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847, it is said that where a mandate of the court has been misconstrued or disregarded, the proper remedy is by mandamus, but where the action of the lower court conforms to the mandate, there can be neither mandamus nor appeal. Texas & P. R. Co. v. Anderson, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464.

Can Court Recall Mandate After Term.

See Phipps v. Sedgwick, 131 U. S. cxxxix Appx., and 24 L. ed 595; Gardner v. Goodyear Dental Vulcanite Co. 131 U. S. ciii Appx. and 21 L. ed. 141. See Herold v. Kahn, 90 C. C. A. 307, 163 Fed. 947, where mandate was recalled; also Bank of Commerce v. Tennessee, 163 U. S. 416, 41 L. ed. 211,

16 Sup. Ct. Rep. 1113. In *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561, 6 Sup. Ct. Rep. 278, the mandate was recalled for want of jurisdiction. In *Reynolds v. Manhattan Trust Co.* 48 C. C. A. 249, 109 Fed. 97, it is said the court has no power to recall a mandate after the term has expired. See, also, *Waskey v. Hammer*, 102 C. C. A. 629, 179 Fed. 273.

Stay of Mandate.

The stay of mandate is in effect the retaining jurisdiction of the cause so that a motion for rehearing may be maintained after the term. *Burget v. Robinson*, 59 C. C. A. 260, 123 Fed. 262; *Omaha Electric Light & P. Co. v. Omaha*, 133 C. C. A. 52, 216 Fed. 855, and cases cited.

Second Appeals.

We have seen already that in second appeals no inquiry is allowed into the original judgment, and where the decision of the lower court is in accord with the mandate no appeal will be allowed. *United States v. New York*, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *Mackall v. Richards*, 116 U. S. 45, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843. They apply when the mandate of the court has not been properly executed (*The Lady Pike* [*Pearce v. Germania Ins. Co.*] 96 U. S. 461, 24 L. ed. 672), or when issues arise not settled by the mandate. (*Hinckley v. Morton*, 103 U. S. 764, 26 L. ed. 458). When allowed, they bring up only the proceedings subsequent to the mandate. *Tyler v. Magwire*, 17 Wall. 253, 21 L. ed. 576; *Clark v. Keith*, 106 U. S. 465, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *United States v. Camou*, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 505; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658; *Stoll v. Loving*, 120 Fed. 806, and cases cited; *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 174; *Montgomery County v. Cochran*, 62 C. C. A. 70, 126 Fed. 456.

CHAPTER CXV.

REMOVALS.

There have always been two ways of removing a cause from a State court to a Federal court—one, as we have before seen under U. S. Rev. Stat. sec. 709, by a writ of error from the Supreme Court of the United States to the court of last resort of a State; the other, by petition and removal from a State court to a circuit court of the United States. See Judicial Code, sec. 28, (Comp. Stat. 1913, sec. 1010.)

This last provision for removal to a circuit court of the United States was made by Congress in the judiciary act of 1789, section 12, U. S. Rev. Stat. sec. 639, clause 1, and this act continued in force until 1875. Under this act no removal from a circuit court to a State court, based on the fact of a Federal question could be made, but only when the jurisdiction rested upon diversity of citizenship, and it was not until 1875 that the fact that the case depended on a Federal question, that any removal from a State court to a circuit court of the United States was permitted.

By the second section of the act of 1875, any suit of a civil nature where the matter in dispute exceeded the sum or value of five hundred dollars arising under the Constitution or laws of the United States, or treaties made, or in which the suit depended on a diversity of citizenship, etc., *either* party could remove it into the circuit court of the United States; and, further, that when there was a separable controversy in a suit which could be wholly determined between citizens of different States, *either* one or more of the defendants, or plaintiffs so interested could remove the case from the State to the Federal court.

Thus stood the law until 1887, when Congress passed another jurisdictional and removal act, which was revised and corrected in 1888, and known as the act of 1887 and 1888, which is now in force.

The first section of the act has already been given and discussed in detail, and we saw the jurisdiction of the Federal courts was contracted by increasing the amount or value involved from five hundred to two thousand dollars, but the grounds of jurisdiction were not changed otherwise. *Foulk v. Gray*, 120 Fed. 159-161.

By section 1 of the act of 1888, providing for removals, it was provided that any suit of a civil nature, in law or equity, arising under the Constitution, or laws of the United States, or treaties made or to be made, or which shall be made under their authority (of which the district courts of the United States are given original jurisdiction by the preceding section), which may now be pending, or which may hereafter be brought in any State court, may be removed by the defendant or defendants therein to the the circuit court of the United States for the proper district. New Code, sec. 28.

Thus far it provides for any suit depending on a Federal question to be removed to a Federal circuit court by the defendant or defendants. It then proceeds: Any other suits of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by section 1 of the act, which are now pending or may hereafter be brought in a State court, may be removed into the district court of the United States by the *defendant* or *defendants* therein being *nonresidents* of the State. New Code, sec. 28.

Again, it retained the separable clause of the Act of 1875, with a change as follows: "And when in any suit mentioned in section 2 there shall be a controversy which is wholly between citizens of different States, and which can be fully determined between them, then either one or more of the defendants actually interested can remove the case." It is thus seen by the act of 1888 jurisdiction by removal has been greatly restricted. New Code, sec. 28.

First. The amount or value necessary to jurisdiction of the district courts of the United States was increased from five hundred dollars, exclusive of costs, to two thousand dollars, exclusive of interest and costs, and now raised to three thousand dollars exclusive of interests and costs. New Code, sec. 24.

Second. Jurisdiction by removal under this act is limited to cases of which the district court of the United States is

given original jurisdiction by section 1,—that is, to such suits as might have been instituted by the plaintiff in the United States circuit court under the first section of the act. *Ex parte Wisner*, 203 U. S. 449–457, 51 L. ed. 264–267, 27 Sup. Ct. Rep. 150, and cases cited; *Yellow Aster Min. & Mill. Co. v. Crane Co.* 80 C. C. A. 566, 150 Fed. 580; *Blunt v. Southern R. Co.* 155 Fed. 499; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992 (See chap. 121, p. 838). New Code, sec. 28.

Third. Instead of “either party,” as in the act of 1875, having the right of removal, only the defendant, or defendants, under the act of 1888, can remove the case when the case depends on a Federal question, and in other cases only by defendant, or defendants, when *nonresidents* of the State in which the suit is brought. *Monroe v. Williamson*, 81 Fed. 988, 989 (See “Who Can Remove”). New Code, sec. 28.

Fourth. In the clause providing for the removal of a separable controversy by *either party* interested therein, only the defendant or the defendants who are *nonresidents* of the State can remove the controversy to the United States circuit court (See “Who Can Remove,” “When Controversy Separable”). New Code, sec. 28. *Casey v. Baker*, 212 Fed. 247; *Hagerla v. Mississippi River Power Co.* 202 Fed. 773; Judicial Code, sec. 28. *Burnett v. Spokane, P. & S. R. Co.* 210 Fed. 94; *Tullar v. Illinois C. R. Co.* 213 Fed. 280.

The right of removal is not changed by the new Code, except as to amount, and procedure as shown in section 29 of the Code. *Bogue v. Chicago, B. & Q. R. Co.* 193 Fed. 730. As to the Construction of sec. 28 Code, see *Smellie v. Southern P. R. Co.* 197 Fed. 643; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 934; *Springer v. American Tobacco Co.* 208 Fed. 200; *Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co.* 209 Fed. 895; *St. John v. United States Fidelity & G. Co.* 213 Fed. 685; *Vestal v. Ducktown Sulphur, Copper & I. Co.* 210 Fed. 376.

See sec. 28, New Code, chap. 3, providing no case can be removed relating to the liability of common carriers to their employees, brought in a State court. Effective January 1st, 1912. *Patton v. Cincinnati, N. O. & T. P. R. Co.* 208 Fed. 29; *Strauser v. Chicago, B. & Q. R. Co.* 193 Fed. 293; *Eng. v. Southern P. Co.* 210 Fed. 92; *Gibson v. Bellingham & N. R.*

Co. 213 Fed. 488. Unless brought under the State act, *Strother v. Union P. R. Co.* 220 Fed. 732. State statutes seeking to prevent removals are unconstitutional. *Western U. Teleg. Co. v. Frear*, 216 Fed. 200.

Local Influence.

Under the same section (No. 2) of the act a provision is made for removal on the ground of local influence, and which provides that where a suit is now pending or may hereafter be brought in a State court in which there is a controversy between a citizen of another State, *any* defendant being a citizen of another State may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to such circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or any other State court to which the defendant under the State laws may remove the same, because of such prejudices or local influence; provided, however, that if it should further appear that there are other defendants not affected by such prejudice or local influence, and there can be a separation of the parties to the suit who are affected by this local influence without prejudice to those who are not affected, then the circuit court shall remand the cause as to such parties not affected by the local influence. *Crotts v. Southern R. Co.* 90 Fed. 2; *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. (See "Practice" under this section. See "Removal on Ground of Local Prejudice.") Section 28, new Code, chap. 3 (Comp. Stat. 1913, sec. 1010).

Agreements Not to Remove Suits.

States statutes have been frequently enacted requiring corporations admitted to do business in the State to sign an agreement not to remove causes to the Federal court. All such conditions are unconstitutional and void. *Western U. Teleg. Co. v. Frear*, 216 Fed. 200-202, and authorities cited.

CHAPTER CXVI.

PROCEEDINGS IN STATE COURTS.

Time of Filing Petition.

By section 3 of the act of 1888 it is provided that a petition must be filed in the State court asking for a removal of the suit to the United States circuit court (See "Motion to Remand;" *First Nat. Bank v. Prager*, 34 C. C. A. 51, 63 U. S. App. 703, 91 Fed. 689; *Wilson v. Giberson*, 124 Fed. 701), of the district in which the suit is brought; and requires the petition to be filed *at or before* the time when, by the law or practice of the State court, the petitioner is required to plead or answer to the suit (*Kansas City, Ft. S. & M. R. Co. v. Daugherty*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626; *Fox v. Southern R. Co.* 80 Fed. 945; *Heller v. Ilwaco Mill & Lumber Co.* 178 Fed. 112). The cause cannot be removed by consent; petition and bond must be filed within the time required; *First Nat. Bank v. Prager*, 34 C. C. A. 51, 63 U. S. App. 703, 91 Fed. 689. New Code, sec. 29 (Comp. Stat. 1913, sec. 1011); *Higson v. North River Ins. Co.* 184 Fed. 169.

The petition should be verified, but if no objection made on this ground, the removal would not be affected. *Porter v. Northern P. R. Co.* 161 Fed. 773; *Howard v. Gold Reefs*, 102 Fed. 657; see *Donovan v. Wells F. & Co.* 22 L.R.A. (N.S.) 1250, 94 C. C. A. 609, 169 Fed. 367; *Canal & C. Streets R. Co. v. Hart*, 114 U. S. 660, 29 L. ed. 228, 5 Sup. Ct. Rep. 1127. All essential averments showing jurisdiction on removal must be set forth. *Gillespie v. Pocahontas Coal & Coke Co.* 162 Fed. 744; *Alexander Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839. Allegations not denied by the record are taken as true. *Atlanta K. & N. R. Co. v. Southern R. Co.* 82 C. C. A. 256, 153 Fed. 122, 11 A. & E.

Ann. Cas. 766; Carlisle v. Sunset Teleph. & Teleg. Co. 116 Fed. 896. The record may be looked to, in aid of the allegations of the petition. Gillespie v. Pocahontas Coal & Coke Co. 162 Fed. 744; Hadfield v. Northwestern Life Assur. Co. 105 Fed. 530.

See sec. 29, chap. 3, new Code, embodying sec. 3 of the act of 1888.

As to construction, see Western U. Teleg. Co. v. Louisville & N. R. Co. 201 Fed. 934; Adams v. Puget Sound Traction, Light & Power Co. 207 Fed. 205; Murray v. Southern Bell Teleph. & Teleg. Co. 210 Fed. 925; as to verification of the petition, St. John v. United States Fidelity & G. Co. 213 Fed. 685. Written notice of intent to file petition for removal is mandatory (see notice of filing). Compliance with sec. 29, Code, accomplishes the entire removal. Williston v. Raymond, 213 Fed. 527; Montgomery v. Postal Teleg. Cable Co. 218 Fed. 471.

Bond.

With the petition for removal must be filed a bond with good and sufficient security, conditioned to file a copy of the record of the case pending in the State court in the district court of the United States within thirty days from the date of filing the petition. Chase v. Erhardt, 198 Fed. 306; new Code, sec. 29. As to filing bond within the time see sec. 1, act 1888; Clark v. Guy, 114 Fed. 783; Austin v. Gagan, 5 L.R.A. 476, 39 Fed. 626, 628; Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 149 Fed. 321; Mutual L. Ins. Co. v. Langley, 145 Fed. 415; Probst v. Cowen, 91 Fed. 929, 930; People's Bank v. Ætna Ins. Co. 53 Fed. 161; Alexandria Nat. Bank v. Willis C. Bates Co. 87 C. C. A. 643, 160 Fed. 839. One good surety is sufficient. Removal Cases, 100 U. S. 472, 25 L. ed. 599. It is not necessary for the removing party to sign. Groton Bridge & Mfg. Co. v. American Bridge Co. 137 Fed. 291. A seal is not necessary. Loop v. Winters, 115 Fed. 364. As to form, see Groton Bridge & Mfg. Co. v. American Bridge Co. *supra*.

While informality in petition and bond may be waived by a failure to promptly object, yet a failure to file a bond is not waived. 25 Stat. at L. 435, chap. 866, U. S. Comp. Stat.

1901, p. 510; Alexandria Nat. Bank v. Willis C. Bates Co. 87 C. C. A. 643, 160 Fed. 839; Austin v. Gagan, 5 L.R.A. 476, 39 Fed. 626; Clark v. Guy, 114 Fed. 783.

Informality may be waived or amended. Coburn v. Cedar Valley Land & Cattle Co. 25 Fed. 791; Johnson v. F. C. Austin Mfg. Co. 76 Fed. 616; Probst v. Cowen, 91 Fed. 929; Deford v. Mehaffy, 13 Fed. 487.

It seems that when made by attorney without authority, it may be ratified before motion to remand. Ashe v. Union Cent. L. Ins. Co. 115 Fed. 236. See Alexandria Nat. Bank v. Willis C. Bates Co. 87 C. C. A. 643, 160 Fed. 839.

Effect of Filing Petition and Bond.

The petition and bond must be filed in the county in which the venue is laid (Noble v. Massachusetts Ben. Asso. 48 Fed. 337), and a proper petition and bond having been filed, it does not require any order of the State court to remove the case; the jurisdiction of the State court ceases, and the jurisdiction of the Federal court attaches at once. Eisenmann v. Delemar's Nevada Gold Min. Co. 87 Fed. 248; Mutual L. Ins. Co. v. Langley, 145 Fed. 415; Barlow v. Chicago & N. W. R. Co. 164 Fed. 765; La Page v. Day, 74 Fed. 977; Mecke v. Valley Town Mineral Co. 89 Fed. 209; Johnson v. Computing Scale Co. 139 Fed. 339; Postal Teleg. Cable Co. v. Southern R. Co. 88 Fed. 803; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Hamilton v. Fowler, 83 Fed. 325; Crehore v. Ohio & M. R. Co. 131 U. S. 243, 33 L. ed. 145, 9 Sup. Ct. Rep. 692. There has been much conflict as to the proposition of the *eo instanti* removal upon filing petition and bond. See Mays v. Newlin, 143 Fed. 576, 577, collecting authorities pro and con; Coker v. Monaghan Mills, 110 Fed. 806. The State court declining to remove does not affect the jurisdiction of the United States court *if* the case is removable. Kern v. Huidekoper, 103 U. S. 490, 26 L. ed. 356; Kirby v. Chicago & N. W. R. Co. 106 Fed. 551; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891. Whatever be the action of the State court the de-

defendant may file the record in the Federal court and proceed with the case as if originally filed there, for the jurisdiction of the Federal court depends on the removability of the case, and not the order of the State court (*Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385; *Hickman v. Missouri, K. & T. R. Co.* 97 Fed. 113; *Kirby v. Chicago & N. W. R. Co.* 106 Fed. 551; *Chesapeake & O. R. Co. v. White*, 111 U. S. 137, 28 L. ed. 378, 4 Sup. Ct. Rep. 353; *Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 773; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 893); and should the Federal court decide for the defendant, he may enjoin the execution of a State judgment against him in the same case, or the State court from further proceeding (*Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 896; *Dietzsch v. Huidekoper* [*Kern v. Huidekoper*] 103 U. S. 498, 26 L. ed. 498; *Wagner v. Drake*, 31 Fed. 852; *Frishman v. Insurance Cos.* 41 Fed. 449; *French v. Hay* [*French v. Stewart*] 22 Wall. 252, 22 L. ed. 858; *Chicago, R. I. & P. R. Co. v. Stepp*, 151 Fed. 909; *Missouri, K. & T. R. Co. v. Scott*, 4 Woods, 386, 13 Fed. 793. See *Coeur D'Alene R. & Nav. Co. v. Spalding*, 35 C. C. A. 302, 93 Fed. 280; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 415), and thus protect its jurisdiction and judgment, as we have before seen. *Baltimore & O. R. Co. v. Ford*, 35 Fed. 173; *Bowdoin College v. Merritt*, 59 Fed. 7. Where the State court proceeds to trial under these circumstances, its judgment would be a nullity if the cause had been properly removed. *Texas & P. R. Co. v. Davis*, 93 Tex. 378, 55 S. W. 562. See, however, *Pioneer Sav. & L. Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 168.

If the clerk of the State court refuses to furnish the record for removal after legal fees tendered, he subjects himself to a fine and imprisonment, or the district court may by writ of *certiorari* command the State court to send up the record, or, if impossible to obtain the record from any cause, the moving party may file a copy of the paper or proceeding by which the same was commenced, and the other party may be required to plead, and the action proceed to judgment. Sec. 39, new Code, chap. 3, (Comp. Stat. 1913, sec. 1021), effective January 1st, 1912.

Notice of Filing Petition for Removal.

New Code, sec. 29, chap. 3 (effective January 1st, 1912), requires notice of filing petition and bond for removal to be given prior to filing the same; the copy of the record is to be filed in the United States District court within thirty days from the date of filing the petition and bond. The parties removing have thirty days after filing the record to plead, answer, or demur. *Goins v. Southern P. Co.* 198 Fed. 432; *Chase v. Erhardt*, 198 Fed. 305; *Hansford v. Stone-Ordean-Wells Co.* 201 Fed. 185. As to form of notice and authorities see *Potter v. General Baking Co.* 213 Fed. 698. The rule is mandatory. *Arthur v. Maryland Casualty Co.* 216 Fed. 386; *Loland v. Northwest Stevedore Co.* 209 Fed. 626.

Power of State Court.

The rule is certain, that on the filing of the petition and bond in the State court for removal, in a *removable* case, no further action can be taken by the State court except to remove, as it is divested of jurisdiction over the case (*Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 653; *Home Ins. Co. v. Morse*, 20 Wall. 454, 22 L. ed. 369; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 136, 141, 26 L. ed. 96, 98; *Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Marshall v. Holmes*, 141 U. S. 595, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; *Monroe v. Williamson*, 81 Fed. 987; *Ashe v. Union Cent. L. Ins. Co.* 115 Fed. 234), and need not present petition to the Federal court. *Waite v. Phoenix Ins. Co.* 62 Fed. 769.

But the State court is not altogether an automaton in dealing with the question of removal; it is not bound to surrender its jurisdiction on a petition for a removal, until a case is made which on the face of the record shows the petitioner has a right to the transfer. *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Mays v. Newlin*, 143 Fed. 576; *Coker v. Monaghan Mills*, 110 Fed. 806; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068; *Home Ins. Co. v. Morse*, 20 Wall. 459, 22 L. ed. 370; *Kansas City, Ft. S. & M. R. Co. v. Daughtery*, 138

U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 364; *Crehore v. Ohio & M. R. Co.* 131 U. S. 241-243, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Johnson v. Wells, F. & Co.* 91 Fed. 25; *Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 773.

It may act on the law but not the facts (*Powers v. Chesapeake & O. R. Co.* 65 Fed. 132; *Coker v. Monaghan Mills*, 110 Fed. 806, and cases cited; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Texas & P. R. Co. v. Eastin*, —Tex. Civ. App. —, 89 S. W. 441, 442); but if solely a question of law the Federal court may pass upon it as well as the State court. *Atlanta Coast Line R. Co. v. Bailey*, 151 Fed. 892, 893. If a *prima facie* case is not shown by the record, then the court can refuse to remove. *Stone v. South Carolina*, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Powers v. Chesapeake & O. R. Co.* 65 Fed. 132; *Springer v. Howes*, 69 Fed. 850; *Crehore v. Ohio & M. R. Co.* 131 U. S. 244, 33 L. ed. 145, 9 Sup. Ct. Rep. 692; *La Montagne v. T. W. Harvey Lumber Co.* 44 Fed. 647; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 148; *Foster v. Paragould Southeastern R. Co.* 74 Fed. 273; *Florida v. Charlotte Harbor Phosphate Co.* 20 C. C. A. 538, 41 U. S. App. 405, 74 Fed. 578; *Wabash R. Co. v. Barbour*, 19 C. C. A. 546, 43 U. S. App. 102, 73 Fed. 515; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 366.

Issue of Fact as to Removability Tried in Federal Court.

The State court can decide for itself whether, as a matter of law, the petitioner is entitled to removal. *Coker v. Monaghan Mills*, 110 Fed. 806, and authorities cited. If, however, the record makes a *prima facie* case, and the issues raised are upon facts stated in the petition, these issues must be tried in the Federal court, and the jurisdiction of the State court is in abeyance until the Federal court trying the issues remands the case. *Dow v. Bradstreet Co.* 46 Fed. 828; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 653; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct.

Rep. 306; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 366; *Chesapeake & O. R. Co. v. McGabe*, 213 U. S. 208, 53 L. ed. 766, 29 Sup. Ct. Rep. 430; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; see *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. 518.

Should Be Presented to State Court.

It has been held that the cause will be remanded, where it appears that the petition and bond for removal were filed in the State court in vacation, and there was nothing to show that they were ever presented to the State court. *Fox v. Southern R. Co.* 80 Fed. 945; see—*Mays v. Newlin*, 143 Fed. 576, 577; giving authorities pro and con; *Roberts v. Chicago, St. P. M. & O. R. Co.* 45 Fed. 433; *Williams v. Massachusetts Ben. Asso.* 47 Fed. 534. But in *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 284–289, a contrary view is taken. *Brown v. Murray, M. & Co.* 43 Fed. 614. The better rule is, that it should be brought to the attention of the State court (*Ibid.*), and may be so brought by one motion. *Monroe v. Williamson*, 81 Fed. 977; *La Page v. Day*, 74 Fed. 977; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068. It is the more decorous practice, and the safer practice. *Noble v. Massachusetts Ben. Asso.* 48 Fed. 338–339.

Order of Removal.

It is not necessary to enter an order of removal (*Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *La Page v. Day*, 74 Fed. 978; *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385; *Noble v. Massachusetts Ben. Asso.* 48 Fed. 338; *Wilson v. Western U. Co.* 34 Fed. 561; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 284); nor, as we have seen, would refusal affect the right, if removable.

An exception to the rule that it is necessary to present the petition and bond to the judge of the State court has been indicated in *Brown v. Murray Nelson & Co.* 43 Fed. 614 and *Gro-*

ton Bridge & Mfg. Co. v. American Bridge Co. 137 Fed. 289. It seems under some conditions it may be granted by a judge in chambers (*Mecke v. Valleytown Mineral Co.* 35 C. C. A. 151, 93 Fed. 697; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 288), and under some conditions by a clerk of the State court (*Sanderlin v. People's Bank*, 140 Fed. 191).

If the State court refuses to enter an order of removal wrongfully, but retains jurisdiction and hears the cause, the wrong, if any, can be remedied by reserving the question, and a final appeal to the Supreme Court of the United States, should the highest court of the State having jurisdiction on appeal sustain the ruling of the lower court on the application to remove. *Coker v. Monaghan Mills*, 110 Fed. 806; *Home L. Ins. Co. v. Dunn*, 19 Wall. 224, 225, 22 L. ed. 69; *Springer v. Howes*, 69 Fed. 849; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068. Or if rightfully removed, the Federal court may enjoin the further proceeding in the State court, as heretofore stated. *Traction Co. v. Madisonville St. Bernard Min. Co.* 196 U. S. 245, 49 L. ed. 464, 25 Sup. Ct. Rep. 251; *Chicago, R. I. & P. R. Co. v. Stepp*, 151 Fed. 914.

Again, the refusal of the State court, rightfully or wrongfully, does not prevent the removal. The petitioner can file the record in the Federal court and proceed with his case there, though pending in the State court; and filing defenses in the State court after removal would not affect his proceedings in the Federal court. See *Mecke v. Valley Town Mineral Co.* 89 Fed. 211; see *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564, where an affirmative remedy asserted in the State court estopped a party from attacking the refusal of the State court to remove the case. The result would be that if the Federal court determines that the case is removable, and takes jurisdiction, the party removing may enjoin the action of the State court, or enjoin the plaintiff from proceeding under the decree of the State court. *French v. Hay* (*French v. Stewart*), 22 Wall. 252, 22 L. ed. 858; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 421, 422; *Dietzsch v. Huidekoper* (*Kern v. Huidekoper*), 103 U. S. 498, 26 L. ed. 498. If the cause was removable, all action by the State court would be without jurisdiction, and void. *Flint v. Coffin*, 100 C. C. A. S. Eq.—50.

342, 176 Fed. 872; *Virginia v. Rives*, 100 U. S. 317, 25 L. ed. 669; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 741, 13 A. & E. Ann. Cas. 1068; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Kern v. Huidekoper*, 103 U. S. 492, 26 L. ed. 357; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 14, 26 L. ed. 645.

Power of the Federal Court Between Filing Petition for Removal and Filing the Record.

We have just seen that as soon as the petition and bond for removal are filed in the State court its jurisdiction ceases, and the question becomes important as to what action the Federal court can take before the record is filed therein. *Coeur D'Alene R. & Nav. Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 285, and authorities.

It was held in *Re Barnesville & M. R. Co.* 2 McCrary, 216, 4 Fed. 10, that the jurisdiction of the Federal court is not complete, so as to hear and determine the cause before the day prescribed by the statute, even though the transcript has been filed (*Removal Cases*, 100 U. S. 475, 25 L. ed. 600), but that many incidental proceedings may be taken, and provisional remedies, such as attachment, etc., granted. *Hamilton v. Fowler*, 83 Fed. 321; *Goldberg B. & Co. v. German Ins. Co.* 152 Fed. 831; *Ryder v. Bateman*, 93 Fed. 23; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 696.

When the record is filed in the Federal court before the return day,—that is, the next regular term after the removal, the Federal court cannot entertain a motion to remand even for want of jurisdiction. *Kansas City & T. R. Co. v. Interstate Lumber Co.* 36 Fed. 9; *Torrent v. S. K. Martin Lumber Co.* 37 Fed. 727. However, these cases were disapproved in *Thompson v. Chicago, St. P. & K. C. R. Co.* 60 Fed. 773, where the party moving to remand had filed the record and given proper notice of the motion, following *Delbanco v. Singletary*, 40 Fed. 181, and *Mills v. Newell*, 41 Fed. 529. See *Texas & St. L. R. Co. v. Rust*, 5 McCrary, 348, 17 Fed. 275, 276.

Cannot Enjoin.

The Federal court cannot enjoin proceedings in a State court, where, though a petition and bond for removal have been filed, no action has been taken thereon by the State court, nor a copy of the record been entered in the Federal court. *Cœur D'Alene R. & Nav. Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 280.

While it does not seem to be well settled what are the powers of a Federal court over the intermediate state of the case, between the filing of the petition and bond in the State court, and the return day to the Federal court, which, as said, is the first day of the next succeeding term of the Federal court, yet I think the rule may be stated, first, that the State court jurisdiction ceases, and the Federal court jurisdiction attaches upon the filing of the petition and bond for removal; second, that while the plaintiff in the State court has not to appear in the Federal court before the return day, and therefore the Federal court has no jurisdiction to proceed to hear the cause on its merits before such return day, or entertain any issue as to the removal itself, yet if any extraordinary proceeding be necessary to preserve the property or rights of the litigants, then upon notice either party may be required to appear for that purpose, and the court may grant the relief. Authorities above; *Hamilton v. Fowler*, 83 Fed. 321; *Goldberg B. & Co. v. German Ins. Co.* 152 Fed. 831; see *Ryder v. Bateman*, 93 Fed. 16; *Western U. Teleg. Co. v. Cooper*, 182 Fed. 710.

Cannot Take Depositions.

It has been held that an application to take depositions, made to the Federal court while the case was in a state of transition, would not be granted, as no extraordinary condition appeared calling for the exercise of the power of the Federal court. *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 698. Your attention is called to a review of the cases upon the subject in *Hamilton v. Fowler*, 83 Fed. 321.

Motion to Remand at Once.

In *Hartford & C. W. R. Co. v. Montague*, 94 Fed. 227, it

is declared the settled practice in the second circuit to allow a motion to remand to be made at once on the removal of a cause, without waiting for the next term, and the plaintiff may file the record if the defendant does not.

Filing Transcript.

We have seen that the filing of the petition and bond for removal vests jurisdiction in the Federal court for all purposes, but the regular course of proceeding is suspended until the record of the case below is filed in the Federal court. So filing the transcript, while not necessary to jurisdiction, yet is necessary for the court to proceed with the trial. *Goldberg B. & Co. v. German Ins. Co.* 152 Fed. 831. (See "Transmitting Record.") New Code, sec. 29 (Comp. Stat. 1913, sec. 1011).

The record of the removed case must be filed within thirty days from the date of filing the petition for removal. New Code, sec. 29. But filing the record is not a question of jurisdiction, and the right is not lost by delay, for the court may permit the record to be filed after the time appointed by statute for proper cause shown. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 16, 26 L. ed. 646; *Rowell v. Hill*, 28 Fed. 434; *Lucker v. Phoenix Assur. Co.* 66 Fed. 162; *Burgunder v. Browne*, 59 Fed. 498; *Eisenmann v. Delemar's Nevada Gold Min. Co.* 87 Fed. 250 and cases cited; *Pierce v. Corrigan*, 77 Fed. 657; *Hatcher v. Wadley*, 84 Fed. 915.

CHAPTER CXVII.

STATUS AFTER REMOVAL.

The case is docketed in the Federal court, retaining the same status as to all process and proceedings that have been taken in the State court, and which have the same effect as if sued out in the Federal court. Secs. 4 and 6, act 1875; 1 U. S. Rev. Stat. Supp. 83. See sec. 36, new Code, chap. 3 (Comp. Stat. 1913, sec. 1018); also sec. 38, new Code, chap. 3. *Cleaver v. Traders' Ins. Co.* 40 Fed. 713; *Davis v. St. Louis & S. F. R. Co.* 25 Fed. 786; *Bryant v. Thompson*, 27 Fed. 881; *Guernsey v. Cross*, 153 Fed. 827; *Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.* 46 Fed. 590; *Duncan v. Gegan*, 101 U. S. 810-812, 25 L. ed. 875, 876; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Bragdon v. Perkins-Campbell Co.* 82 Fed. 338; *Allmark v. Platte S. S. Co.* 76 Fed. 615; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 930; *Denison v. Shawmut Min. Co.* 124 Fed. 860; *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.* 108 Fed. 454; *Eureka & K. R. Co. v. California & N. R. Co.* 103 Fed. 897; *Porter Land & Water Co. v. Baskin*, 43 Fed. 325; *Mercantile Nat. Bank v. Barron*, 165 Fed. 832; *Mannington v. Hocking Valley R. Co.* 183 Fed. 133.

¹ Thus the lien of an attachment property sued out in the State court is not affected by removal. *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267; *Hubbard v. Central R. Co.* 135 Fed. 256; *Lebensberger v. Scofield*, 71 C. C. A. 476, 139 Fed. 380. And where the action in the State court against a nonresident is by attachment, the removal by him does not give the Federal court jurisdiction of his person. *Wells v. Clark*, 136 Fed. 462, overruled in 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43, followed in *Mercantile Nat. Bank v. Barron*, 165 Fed. 832. See *Purdy v. Wallace Miller & Co.* 81 Fed. 513.

The rule as above given applies unless repugnant to the Constitution and laws. See *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 957, refusing to allow depositions taken in the State court to be read in the Federal court. *Zych v. American Car & Foundry Co.* 127 Fed. 726-727; see *Texas & P. R. Co. v. Watson*, 50 C. C. A. 230, 112 Fed. 402; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700.

Defenses to be Heard in the Federal Court.

The purpose of the removal act is to give the nonresident defendant the privilege of having his defenses heard in the Federal court (*Wabash Western R. Co. v. Brow*, 164 U. S. 277-278, 41 L. ed. 433, 434, 17 Sup. Ct. Rep. 126), and he is required to file his petition for removal on or before the time he is required to file his defenses in the State court. *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 686, 38 L. ed. 316, 14 Sup. Ct. Rep. 533; sec. 3, act 1875. (See "When Not Removed in Time," chapter 118, p. 793. And this rule applies whatever may have been the proceedings in the State court before the time the defendant was required to remove (*Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 661; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 930), unless trial on the merits has begun in the State courts though raised by demurrer (*Alley v. Nott*, 111 U. S. 476, 477, 28 L. ed. 492, 4 Sup. Ct. Rep. 495; *Bank of Maysville v. Claypool*, 120 U. S. 270, 30 L. ed. 633, 7 Sup. Ct. Rep. 545; *Gregory v. Hartley*, 113 U. S. 742-746, 28 L. ed. 1150-1152, 5 Sup. Ct. Rep. 743), but not hearing a preliminary motion to dissolve an injunction in the State court (*Cella v. Brown*, 136 Fed. 439, 440, and cases cited; see *Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 661-663; new Code, sec. 38).

When Plaintiff Dismisses After Removal.

Where plaintiff appears and dismisses his suit in the Federal court after removal, he must file a new suit; he cannot proceed on the old pleading in the State court. *Texas & P. R. Co. v. Huber*, — Tex. Civ. App. —, 95 S. W. 569, 570.

CHAPTER CXVIII.

REMANDING.

I have thus given the acts of Congress affecting the removal of a suit from the State court to the United States circuit court, and the status of the case after removal. It is not my purpose to discuss these acts further than may be necessary to develop the practice of the United States circuit court upon motions to *remand*. Excellent works on removals have been given to the profession, and these must be consulted for procedure and forms.

I shall assume that the cause has been removed under one of the provisions of the act as above given, and will only discuss such steps as should be taken in the Federal court after the removal.

The first step to be taken after the case has been removed is to examine whether the defendant or defendants have complied with the Federal statutes in the procedure required, or the grounds upon which removals are permitted. They must be followed because jurisdictional. *Mayo v. Dockery*, 108 Fed. 899; *Wabash Western R. Co. v. Brow*, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126. And the right to determine these questions is wholly with the Federal courts after removal (*Dow v. Bradstreet Co.* 46 Fed. 828; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 805; *Woodson County v. Toronto Bank*, 128 Fed. 159), because, as said, on filing of the petition and bond the removal is affected at once (*Mecke v. Valley Town Mineral Co.* 89 Fed. 209-211).

If the jurisdictional facts are not shown, however, the State court is not bound to give up its jurisdiction (*Stone v. South Carolina*, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Coker v. Monaghan Mills*, 110 Fed. 806; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 516, 30 L. ed. 1160, 7 Sup. Ct.

Rep. 1262; Powers v. Chesapeake & O. R. Co. 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264); and if the case goes to judgment in the State court, you may review the refusal by writ of error to the Supreme Court of the United States. Ibid.; Missouri, P. R. Co. v. Fitzgerald, 160 U. S. 557-582, 40 L. ed. 536-542, 16 Sup. Ct. Rep. 389; Stone v. South Carolina, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

Statutes Controlling the Remanding of Causes.

It is provided by section 5 of the act of 1875, that if in any suit removed to the Federal court from a State court it shall appear to the satisfaction of said circuit court at *any time* after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court or that parties to such suit in the State court have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case removable into the Federal court, the said circuit court shall proceed no further therein, but shall remand it to the court from which it was removed, making such order as to costs as may be just. Baum v. Longwell, 200 Fed. 450; new Code, sec. 37 (Comp. Stat. 1913, sec. 1019); Cerri v. Akron People's Teleph. Co. 219 Fed. 285; Western U. Teleg. Co. v. Louisville & N. R. Co. 208 Fed. 581; Bowens v. Chicago, M. & St. P. R. Co. 215 Fed. 287.

Again, under clause 2 of the act of 1888 it is provided for remanding causes removed on the ground of local prejudice as follows: "At any time before the trial of any suit which is now pending in any circuit court, or may be hereafter entered therein, and which has been removed from a State court on the ground of local prejudice, the circuit court shall, on the application of the other party, examine into the truth of the affidavit of local prejudice, and unless it shall appear to the satisfaction of the circuit court that said party will not obtain justice in the State court it shall cause the suit to be remanded to the State court. New Code, sec. 28 (Comp. Stat. 1913, sec. 1010).

By the sixth clause of section 2 of the act there is no appeal from the order to remand.

Causes for Remanding.

Thus, having seen the statutory duty of the circuit courts of the United States as to remanding causes, I shall now inquire into the causes for remanding, assuming that a proper petition and bond have been filed; and first—

When Not Removed in Time.

The first inquiry would be as to the time the petition and bond for removal were filed in the State court, and the Federal court must determine it. *Fidelity Trust & S. Co. v. Newport News & M. Valley Co.* 70 Fed. 403. The statute, as we have seen, requires it to be filed at or before the time when by the State law the defendant is required to plead or answer to the petition in the State court, which, in Texas, must be on or before the second day of the return term of the citation. *Tex. Rev. Stat.* 1447, 1263. *First Nat. Bank v. Appleyard*, 138 Fed. 939; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Daugherty v. Western U. Teleg. Co.* 61 Fed. 138; *American Bonding Co. v. Mills*, 81 C. C. A. 325, 152 Fed. 107; *Goldberg v. German Ins. Co.* 152 Fed. 831; *Overholt v. German American Ins. Co.* 155 Fed. 488; *Quilhot v. Hamer*, 158 Fed. 188; *Goldey v. Morning News*, 156 U. S. 524, 39 L. ed. 519, 15 Sup. Ct. Rep. 559; *Fidelity & C. Co. v. Hubbard*, 117 Fed. 952; *Oliver v. Iowa C. R. Co.* 102 Fed. 371; *Gregory v. Boston Safe Deposit & T. Co.* 88 Fed. 4; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 27; *Maher v. Tower Hotel Co.* 94 Fed. 226; *First Littleton Bridge Co. v. Connecticut River Lumber Co.* 71 Fed. 225. See *Winkler v. Chicago & E. I. R. Co.*—see, also, 120 U. S. 786–794, 108 Fed. 307, as to the time required under the Federal acts of 1789, 1866, and 1875.

When the service on the nonresident defendant has been made by publication, which is required to be published for a specific number of weeks, the full time must expire before the defendant is required to answer within the removal act, though the last publication was made before the time expired. *Tenney v. American Pipe Mfg. Co.* 96 Fed. 919; *Batts's Rev. Stat.* (Tex.) 1235, 1264.

Again, when the State law permits a person served by publication to have a retrial if appearing within a certain time, the cause could not be removed by such defendant on his appearance. *Davis v. Harris*, 124 Fed. 713.

If the petition for removal is filed after the day upon which a dilatory plea or the answer is required to be filed by the State law, the State court may refuse the removal, and, if removed, the Federal court should remand (*Head v. Selleck*, 110 Fed. 786; *Lantz v. Fretts*, 173 Fed. 1008, and cases cited. *First Nat. Bank v. A. E. Appleyard & Co.* 138 Fed. 939; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 673, 678, 38 L. ed. 311, 313, 14 Sup. Ct. Rep. 533; *Gregory v. Boston Safe Deposit & T. Co.* 88 Fed. 3; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.* 71 Fed. 225; *Daugherty v. Western U. Teleg. Co.* 61 Fed. 138; *Laidly v. Huntington*, 121 U. S. 181, 30 L. ed. 884, 7 Sup. Ct. Rep. 855; *Delbanco v. Singletary*, 40 Fed. 178; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578); and when the action is joint, if by expiration of time one defendant loses his right the other is bound (*Calderhead v. Downing*, 103 Fed. 29 and cases cited; see *Morgan's L. & T. R. & S. S. Co. v. Street*, 57 Tex. Civ. App. 194, 122 S. W. 270); but this failure to file the petition in time may be waived, as it has been held that it is not essential to jurisdiction (*Powers v. Chesapeake & O. R. Co.* 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep. 264, and cases cited; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 688, 38 L. ed. 316, 14 Sup. Ct. Rep. 533; *French v. Hay*, 22 Wall. 238, 22 L. ed. 801; *Knight v. International & G. N. R. Co.* 9 C. C. A. 376, 23 U. S. App. 356, 61 Fed. 90), and going to trial in the Federal court would waive (*Newman v. Schwerin*, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870; *Collins v. Stott*, 76 Fed. 614).

So where the plaintiff appears for any other purpose than to object to the removal, and to move to remand would waive.

Again, where one consents to the removal he cannot object to the time of removal. *Connell v. Smiley*, 156 U. S. 339, 39 L. ed. 444, 15 Sup. Ct. Rep. 353.

When the service of summons in the State court is void, the time limited by statute does not bind the defendant, but

he may appear and remove even after judgment. *Tortat v. Hardin Min. & Mfg. Co.* 111 Fed. 426; *Cady v. Associated Colonies*, 119 Fed. 424; *Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598.

When Motion to Remand Made.

The motion to remand on the ground that the petition for removal was not filed in time should be made promptly as it may be waived, because, as said, the failure to file in time is not fundamental, but in a sense modal and formal (*Act 1888*, sec. 3; *Ayers v. Watson*, 113 U. S. 598, 28 L. ed. 1094, 5 Sup. Ct. Rep. 641; *Collins v. Stott*, 76 Fed. 614; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 99, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; *Newman v. Schwerin*, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870); and acts recognizing the jurisdiction of the Federal court, or great delay in the motion to remand, would waive the failure of the defendant to file the petition for removal in time (*ibid.*; *Guarantee Co. of N. A. v. Hanway*, 44 C. C. A. 312, 104 Fed. 369, 374, and cases cited; *Atlantic, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 660, 661; *Baltimore & O. R. Co. v. Ford*, 35 Fed. 170; *Hamilton v. Fowler*, 83 Fed. 321; *Newman v. Schwerin*, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 688, 38 L. ed. 316, 14 Sup. Ct. Rep. 533).

Effect of Extension of Time to Answer.

The agreement of parties to extend the time to answer cannot change the statute requiring the petition for removal to be filed at or before the time required by the State law to answer, and it must be filed as required, whether there be an agreement to extend the time to answer or not. There has, however, been such conflict of opinion that it would be proper to say the rule varies in the different circuits. *Tevis v. Palatine Ins. Co.* 149 Fed. 561. See *Murphy v. Herring-Hall-Marvin Safe Co.* 184 Fed. 497.

Thus, the rule, as stated above, has been upheld in *Austin v. Gagan*, 5 L. R. A. 476, 39 Fed. 626; *Dixon v. Western U.*

Telegraph Co. 38 Fed. 377; *Martin v. Carter*, 48 Fed. 596; *Yarnell v. Felton*, 102 Fed. 369; same case 104 Fed. 161; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 932, 933; *Velie v. Manufacturers' Acci. Indemnity Co.* 40 Fed. 545; *Ruby Canyon Gold Min. Co. v. Hunter*, 60 Fed. 305; *Schipper v. Consumer Cordage Co.* 72 Fed. 803. A distinction is drawn in this last case between an extension of time by agreement and by the order of the court. *Ibid.*; *Fidelity Trust & S. V. Co. v. Newport News & M. Valley Co.* 70 Fed. 406; *Mecke v. Valley Town Mineral Co.* 89 Fed. 209; *Price v. Lehigh Valley R. Co.* 65 Fed. 826. See *Spangler v. Atchison, T. & S. F. R. Co.* 42 Fed. 305, as to distinction between order of court and rule of court as to extension of time. While it has been held contra in *Russell v. Harriman Land Co.* 145 Fed. 745; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 297-299; *Chiatovich v. Hanchett*, 78 Fed. 193; *People's Bank v. Ætna Ins. Co.* 53 Fed. 161; *Dancel v. Goodyear Shoe Machinery Co.* 106 Fed. 551; *Rycroft v. Green*, 49 Fed. 177; *Lord v. Lehigh Valley R. Co.* 104 Fed. 929; *Mayer v. Ft. Worth & D. C. R. Co.* 93 Fed. 601; *Collins v. Stott*, 76 Fed. 613; *Phenix Ins. Co. v. Charleston Bridge Co.* 13 C. C. A. 58, 25 U. S. App. 190, 65 Fed. 628; See *Tevis v. Palatine Ins. Co.* 149 Fed. 561, 562, collecting authorities pro and con.

Again, it has been held that the time to file a petition for removal cannot be extended when the court extends the time to answer on an *ex parte* order (*Hurd v. Gere*, 38 Fed. 537); nor when the time has been extended by rule of court (see *Spangler v. Atchison, T. & S. F. R. Co.* 42 Fed. 305 as to distinction between order of court and rule of court). The Federal court will not take judicial notice of a rule of court extending the time for pleading beyond the statute. *Yarnell v. Felton*, 104 Fed. 161, s. c. 102 Fed. 369.

The Federal courts do not take judicial notice of the rules of the State courts. *Randall v. New England Order of Protection*, 118 Fed. 782.

I submit the rule as first stated is correct; the act requires the petition to be filed at or before the time when answer is due according to the State law, and a proper construction clearly excludes the idea that it may be dependent on the agreement of parties, or the extension of time by a court to answer

beyond that fixed by the statute. Besides, the right of removal must appear in the case as the plaintiff has made it, and does not in any way depend on the answer to be filed; and the right of removal existing and apparent when the agreement to extend the time for answering is made, should be construed to be a waiver of the right of removal, rather than an extension of the time to apply for it.

When Right of Removal Arises After the Time Fixed by Statute.

Sometimes the right of removal does not exist at the time when by the State law the answer is to be filed, but may arise in the subsequent proceedings in the State court, as where the amended petition first discloses the right to remove, or other defendants made (*Jones v. Mosher*, 46 C. C. A. 471, 107 Fed. 563; *Guarantee Co. of N. A. v. Hanway*, 44 C. C. A. 312; 104 Fed. 374; *Green v. Valley*, 101 Fed. 884; *Enders v. Lake Erie & W. R. Co.* 101 Fed. 203; *Bailey v. Mosher*, 95 Fed. 223; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 193; *Barber v. Boston & M. R. Co.* 145 Fed. 52; *Robinson v. Parker-Washington Co.* 170 Fed. 850; *Roberts v. Chicago, B. & Q. R. Co.* 168 Fed. 316; *Youtsey v. Hoffman*, 108 Fed. 693; *Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598; *West Virginia v. King*, 112 Fed. 369), as, for instance, when by change of parties by dismissal, or otherwise, the controversy for the first time becomes one wholly between citizens of different States (*Ibid.*; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Green v. Valley*, 101 Fed. 882; *Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598; *Diday v. New York, P. & O. R. Co.* 107 Fed. 567; *Calderhead v. Downing*, 103 Fed. 27; *Moeller v. Southern P. Co.* 211 Fed. 240; but the right may be lost, see *Morgan's L. & T. R. & S. S. Co. v. Street*, 57 Tex. Civ. App. 194, 122 S. W. 270; *Huber v. Texas & P. R. Co.* — Tex. Civ. App. —, 113 S. W. 984); or when the original petition in the State court is for an amount not in excess of two thousand dollars, but plaintiff by amendment greatly increases the claim so as to bring it within Federal jurisdiction (*Enders v. Lake Erie R. Co.* 101 Fed. 203; *Price v. Ellis*, 129 Fed. 485, 486;

Walcott v. Watson, 46 Fed. 529; Clarkson v. Manson, 18 Blatchf. 443, 4 Fed. 257; Jones v. Mosher, 46 C. C. A. 471, 107 Fed. 563, citing Northern P. R. Co. v. Austin, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep. 758; Swann v. Mutual Reserve Fund Life Asso. 116 Fed. 232; Peterson v. Chicago, M. & St. P. R. Co. 108 Fed. 561; Simmons v. Mutual Reserve Fund Life Asso. 114 Fed. 785); or where by amendment the cause of action is made to depend on a Federal question not appearing in the original petition (Green v. Valley, 101 Fed. 882; Bailey v. Mosher, 95 Fed. 223; Guarantee Co. of N. A. v. Hanway, 44 C. C. A. 312, 104 Fed. 369); but the amendment must, in effect, state a new cause of action (Painter v. New River Mineral Co. 98 Fed. 544).

In either of the events happening as above stated, a motion to remove to the Federal court promptly made should be sustained, and therefore a motion to remand when a motion is made under these conditions will not be sustained.

In determining the promptness with which a motion to remove is made, time must be calculated from the filing of the amended petition. Evans v. Dillingham, 43 Fed. 177.

Effect of Filing Answer in State Court.

The filing of an answer in the State court before the time has elapsed for pleading or answering under the State law, and the petition for removal to be filed, as when necessary to move the dismissal of a preliminary injunction, does not affect the right to remove within the period permitted by statute. Cella v. Brown, 136 Fed. 439; Powers v. Chesapeake & O. R. Co. 169 U. S. 93, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Champlain Constr. Co. v. O'Brien, 104 Fed. 930; Wilcoxon v. Chicago, B. & Q. R. Co. 116 Fed. 444; Sidway v. Missouri Land & Live Stock Co. 116 Fed. 382-394, and cases cited. As to effect of plea to jurisdiction of the State court, see Olds v. City Trust S. D. & Surety Co. 114 Fed. 975. The rule may be stated that whether necessary to be filed in aid of some preliminary procedure or not, the mere filing of an answer in the State court before the time has elapsed to file a petition for removal does not bar the right to remove within the time permitted by statute. The right is only lost by going beyond the absolutely

required time. *Champlain Constr. Co. v. O'Brien*, 104 Fed. 933; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 27.

But it seems that where a State fixes no time for filing an answer, that a demurrer to the bill for *insufficiency*, which was presented and overruled, would cut off the right to remove (*Winkler v. Chicago & E. I. R. Co.* 108 Fed. 305-307; *Lantz v. Fretts*, 173 Fed. 1007, 1008). The hearing and determination of a demurrer in a State court bars the right of removal. *Ibid.* 1009, and cases cited; *Rosenthal v. Coates*, 148 U. S. 142, 37 L. ed. 399, 13 Sup. Ct. Rep. 576. Or when defendant files a demurrer and stipulates for a hearing of the cause. *Case v. Olney*, 106 Fed. 433.

Where one is sued in the State court in the *same* action both upon individual and partnership liability, the appearance in the State court to contest the validity of an attachment affecting his individual liability would not deprive him of the right as a member of the partnership to remove the cause. *Calderhead v. Downing*, 103 Fed. 27.

Where Action Joint.

The rule, however, is that when the action is *joint*, and one defendant answers and submits to the jurisdiction of the State court, it deprives the other of the privilege of removing the cause (*Ibid.*; *Abel v. Book*, 120 Fed. 47); or one defendant loses his right the other is bound, as where one partner loses the right to remove it subjects the other to the disability. *Fletcher v. Hamlet*, 116 U. S. 410, 29 L. ed. 680, 6 Sup. Ct. Rep. 426; *Rogers v. Van Nortwick*, 45 Fed. 514; *Jones v. Casey-Hedges Co.* 213 Fed. 43.

To What Term of the Federal Court Case Should Be Removed.

The next point of observation should be as to whether the record from the State court has been filed at the proper term of the Federal court, and within proper time.

Under sec. 29, chap. 3 of the new Code (Comp. Stat. 1913, sec. 1011), effective January 1st, 1912, it is required that a certified copy of the record must be filed within thirty days from the date of filing the petition and bond, and the party removing

has thirty days from filing the record to plead, answer, or demur.

A failure to file the record in the Federal court within the time stated does not restore the jurisdiction of the State court (National S. S. Co. v. Tugman, 106 U. S. 122, 27 L. ed. 89, 1 Sup. Ct. Rep. 58), but is a cause for remanding the case. U. S. Rev. Stat. sec. 641; Hatcher v. Wadley, 84 Fed. 913. However, many exceptions have been recognized, and Federal courts have refused to remand when a reasonable cause for the failure has been set up and proven. Hatcher v. Wadley, 84 Fed. 915; Lucker v. Phœnix Assur. Co. 66 Fed. 162; Pierce v. Corrigan, 77 Fed. 657; St. Paul & C. R. Co. v. McLean, 108 U. S. 217, 27 L. ed. 704, 2 Sup. Ct. Rep. 498; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Rowell v. Hill, 28 Fed. 433; Eisenmann v. Delemar's Nevada Gold-Min. Co. 87 Fed. 248. (See "When Not Removed in Time.")

Thus, in Kelly v. Chicago & S. R. Co. 122 Fed. 286, the removing defendant awaited the action of the State court upon his application to remove, and was thus delayed until after the time the transcript should have been filed in the Federal court. It was held a reasonable ground, and the court refused to remand the case. So it may be said that a failure to file the record in the Federal court within the statutory time required would be good ground for remanding, if the failure was without reasonable excuse.

Transmitting the Record.

The removing party must transmit the record (Hatcher v. Wadley, 84 Fed. 913), but adverse party may file it and move to remand. Re Newark & H. Traction Co. 110 Fed. 25. (See Filing Transcript.)

Want of Jurisdiction as a Ground to Remand.

Our next point of observation would be, did the State court have jurisdiction of the *subject-matter*; for if the court *a quo* had done, the jurisdiction in the Federal court cannot attach by removal, even though the suit could have been originally brought in the Federal court. 25 Stat. at L. 433, chap. 866,

(Comp. Stat. 1913, sec. 1010); Thacker Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 271; Cowley v. Northern P. R. Co. 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 127; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858. This question of the State's jurisdiction of the subject-matter may be raised in the Federal court after removal, whereupon the Federal court should dismiss, and not remand. Auracher v. Omaha & St. L. R. Co. 102 Fed. 1.

To illustrate: An action in a State court upon some matter exclusively within the jurisdiction of a Federal court, as an action founded upon the violation of the interstate law, is removable, and when removed will be dismissed (Sheldon v. Wabash R. Co. 105 Fed. 786; Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Fidelity Trust Co. v. Gill Car Co. 25 Fed. 737; Crowley v. Southern R. Co. 139 Fed. 853, 854), but if the State court had jurisdiction, the fact that defendant pleaded a defense of which the State court could not have taken cognizance would not affect the Federal jurisdiction. Lehigh Valley R. Co. v. Rainey, 99 Fed. 596.

In a limited sense the jurisdiction of the Federal court in removal cases is derivative, so that if the State court had no jurisdiction the Federal court has none. Ibid.

When Case Not Within the Jurisdictional Act.

We must next look to see if the case in the State court falls within the terms of the Federal jurisdictional act, for if not, it will be remanded. See *Re Cilley*, 58 Fed. 977, for construction of act of 1888.

Removals made on the ground of diversity of citizenship, proper amount, or a Federal question, apparent in the plaintiff's case, touch the fundamental jurisdiction of the Federal court, and, as we have heretofore seen, in such cases, it must clearly appear in the petition of plaintiff, if based on a Federal question; or may appear in the petition of plaintiff in the State court, or made to appear in the petition for removal if based on diversity of citizenship. *Harrington v. Great Northern R. Co.* 169 Fed. 714; *Huntington v. Pinney*, 126 Fed. 237, 238; *Johnson v. Wells, F. Co.* 91 Fed. 3; *Ysleta v. Can-S. Eq.*—51.

da, 67 Fed. 8; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 744; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 814; *Chappell v. Waterworth*, 155 U. S. 107, 39 L. ed. 87, 15 U. S. App. 34; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 841; *Walker v. Collins*, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Carson v. Dunham*, 121 U. S. 426, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030; *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 311; *Gillespie v. Pocahontas Coal & Coke Co.* 162 Fed. 742; *Willard v. Chicago, B. & Q. R. Co.* 91 C. C. A. 215, 165 Fed. 181. (See "Removal on Diversity of Citizenship," and "On Ground of Federal Question.")

By section 5 of the act of 1875, as we have seen, it is made the duty of the Federal court to remand the cause at any time after the suit is removed, when it appears that such suit does not involve a dispute or controversy properly within the jurisdiction of the Federal court, or when parties have been collusively joined to make the cause removable (see chapter 92). *Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 241.

Whenever the cause is removed because of the alleged existence of one of these grounds of jurisdiction, you may make the issue by motion to remand, and contest the truth of the allegation, whether it be of citizenship, amount, or a Federal question.

The issue can only be tried in the Federal court (*Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 773; *Carson v. Hyatt*, 118 U. S. 287, 30 L. ed. 169, 6 Sup. Ct. Rep. 1050; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 515-517, 30 L. ed. 1160, 1161, 7 Sup. Ct. Rep. 1262; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306), and when raised it must be in the language of the statute, and be proven to the satisfaction of the court that the jurisdiction does not exist, or the case must be remanded. And when shown, it is the duty of the court to remand at any stage of the proceeding where it appears that the cause has been wrongfully removed, though pleading and evidence have been permitted to be filed and taken in the Federal court. *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508. Juris-

diction cannot be inferred by acts of plaintiff or by consent. *Crane Co. v. Guanica Centrale*, 132 Fed. 713.

Again, this duty to remand cannot be affected by the fact that there is no apparent cause of action stated, that is for the State court to determine. *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508; *Ayres v. Wiswall*, 112 U. S. 187-193, 28 L. ed. 693-695, 5 Sup. Ct. Rep. 90; *Evans v. Felton*, 96 Fed. 176.

When Question Doubtful Should Remand.

It is the duty of the court to remand where there is doubt. *Groel v. United Electric Co.* 132 Fed. 265 and cases cited; *Concord Coal Co. v. Haley*, 76 Fed. 882; *Hutcheson v. Bigbee*, 56 Fed. 329; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650; *Wrightsville Hardware Co. v. Colwell*, 180 Fed. 589; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 932; *Drainage Dist. v. Chicago, M. & St. P. R. Co.* 198 Fed. 264.

Costs on Remand.

Court can make such order as to costs as shall be just. New Code, sec. 37 (Comp. Stat. 1913, sec. 1019). See *Western U. Teleg. Co. v. Louisville & N. R. Co.* 208 Fed. 582, as to allowing docket fee. *Bowens v. Chicago, M. & St. P. R. Co.* 215 Fed. 287.

CHAPTER CXIX.

DIVERSITY OF CITIZENSHIP IN REMOVAL.

When diversity of citizenship is set up as ground for removal it must appear to have existed when the suit began, as well as at the time the application for removal was made; and if it does not so appear, the case should be remanded. *Wilson v. Giberson*, 124 Fed. 701; *Huntington v. Pinney*, 126 Fed. 237; *Freeman v. Butler*, 39 Fed. 1; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Kellam v. Keith*, 144 U. S. 570, 36 L. ed. 544, 12 Sup. Ct. Rep. 922; *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 56, 39 L. ed. 895, 15 Sup. Ct. Rep. 725; *Oroville & N. R. Co. v. Leggett*, 162 Fed. 572; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 841; *Santa Clara County v. Goldy Mach. Co.* 159 Fed. 750; *Jones v. Adams Exp. Co.* 129 Fed. 618; *Irving v. Smith*, 132 Fed. 207; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 13; *Thompson v. Staulmann*, 131 Fed. 809; *Lawrence v. Southern P. Co.* 165 Fed. 241. Code, sec. 28 (Comp. Stat. 1913, sec. 1010); *West Side R. Co. v. California P. R. Co.* 202 Fed. 333; *Storm Lake Tub & Tank Co. v. Minneapolis & St. L. R. Co.* 209 Fed. 895. See *Jackson v. Hooper*, 188 Fed. 509, where parties were citizens of the United States, but neither of them residents in a State. The case was remanded. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147. However, in determining diversity as ground of removal one is not bound by the manner in which parties are placed in the bill, but as has been before shown, the court will place or shift the parties according to their real interest, and if by thus shifting them the proper diversity can be shown the court will not remand. *Hutton v. Joseph Bancroft & S. Co.* 77 Fed. 482; *Groel v. United Elec-*

tric Co. 132 Fed. 254; Harter Twp. v. Kernochan, 103 U. S. 566-567, 26 L. ed. 412; Adelbert College v. Toledo, W. & W. R. Co. 47 Fed. 844.

Indispensable Parties are Alone Considered.

Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; Cella v. Brown, 136 Fed. 441; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610 and cases cited; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Higgins v. Baltimore & O. R. Co. 99 Fed. 641; Lucas v. Milliken, 139 Fed. 816.

If the bill does not show diversity of citizenship to give jurisdiction, the petition for removal may set up the facts showing diversity of citizenship does exist by shifting the parties according to interest, or by striking out informal parties, or it may set up a collusion and fraudulent joinder of parties by plaintiff in order to prevent removal. Santa Clara County v. Goldy Mach. Co. 159 Fed. 750; Groel v. United Electric Co. 132 Fed. 254; Fife v. Whittell, 102 Fed. 537; Ysleta v. Canda, 67 Fed. 8; Hutton v. Joseph Bancroft & S. Co. 77 Fed. 482; Harter Twp. v. Kernochan, 103 U. S. 566, 567, 26 L. ed. 412, 413; Seaboard Air Line R. Co. v. North Carolina R. Co. 123 Fed. 630; Reese v. Zinn, 103 Fed. 97; Kimball v. Cedar Rapids, 99 Fed. 132.

If neither the bill nor the petition for removal shows jurisdictional facts, the circuit court will not permit an amendment to show jurisdiction and cause for removal, as we shall hereafter see. Fife v. Whittell, 102 Fed. 537; Murphy v. Payette Alluvial Gold Co. 98 Fed. 321; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co. 89 Fed. 113. Where diversity is alleged but defectively, it may be amended. See act of Congress March 3d, 1915, providing if suit is brought in, or removed to a Federal court upon the ground of diversity of citizenship, and such diversity actually existed, though defectively alleged, either party may amend at any stage of the proceedings, and in the appellate court upon such terms as the court may impose, so as to show on the record

the diversity. *Thompson v. Stalman*, 131 Fed. 811; *Stadlermann v. Whiteline Towing Co.* 92 Fed. 209. (See "Amending Petition for Removal.") Diversity cannot be set up in a petition for removal by stating citizenship of partners, if not made parties to suit as individuals. *Ralya Market Co. v. Armour & Co.* 102 Fed. 530; see "Amendment of Petition."

Fraudulent Joinder to Prevent Removal.

The circuit court of the United States will not permit plaintiff to join formal parties, or fraudulently join with the defendant parties whose citizenship would defeat a diversity of citizenship and thereby prevent removal. *Free v. Western U. Teleg. Co.* 122 Fed. 311; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286; *Crawford v. Illinois C. R. Co.* 130 Fed. 395 and cases cited; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 86; *Boatner v. American Exp. Co.* 122 Fed. 714; *Ross v. Erie R. Co.* 120 Fed. 703; *McCormick v. Illinois C. R. Co.* 100 Fed. 250; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209; *Axline v. Toledo W. V. & O. R. Co.* 138 Fed. 169; *Offner v. Chicago & E. R. Co.* 78 C. C. A. 359, 148 Fed. 202; *Prince v. Illinois C. R. Co.* 98 Fed. 1; *Doremus v. Root*, 94 Fed. 760; *Dow v. Bradstreet Co.* 46 Fed. 824; See *Charman v. Lake Erie & W. R. Co.* 105 Fed. 449, and *Welch v. Cincinnati, N. O. & T. P. R. Co.* 177 Fed. 760; *Lewis v. Cincinnati, N. O. & T. P. R. Co.* 192 Fed. 655; *Gibson v. Chesapeake & O. R. Co.* 131 C. C. A. 332, 215 Fed. 24; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; *Armstrong v. Kansas City Southern R. Co.* 192 Fed. 608; *Clark v. Chicago, R. I. & P. R. Co.* 194 Fed. 505; *McAllister v. Chesapeake & O. R. Co.* 198 Fed. 660. The burden of proof on the party charging. *Enos v. Kentucky Distillers & Warehouse Co.* 111 C. C. A. 74, 189 Fed. 342. See *Trivette v. Chesapeake & O. R. Co.* 129 C. C. A. 177, 212 Fed. 641; *Armstrong v. Kansas City Southern R. Co.* 192 Fed. 608; *Shaver v. Pacific Coast Condensed Milk Co.* 185 Fed. 316.

Fraudulent Joinder to Remove.

Nor can you fraudulently join a party to create diversity

so as to remove. *Pennsylvania R. Co. v. Alleghany Valley R. Co.* 25 Fed. 113. Where the cause of action is joint, you may join a defendant, though the purpose is to prevent removal. *Evansberg v. Insurance Stove, Range & Foundry Co.* 168 Fed. 1001; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 750; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; see *Knuth v. Butte Electric R. Co.* 148 Fed. 73. See "Motion to Remand for Fraudulent Joinder," chapter 131. *McGarvey v. Butte Miner Co.* 199 Fed. 672.

Where Issue Determined.

These issues are to be determined by the Federal court. *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896; *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 70, 47 L. ed. 79, 23 Sup. Ct. Rep. 24; *Woodson County v. Toronto Bank*, 128 Fed. 157; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Arrow-smith v. Nashville & D. R. Co.* 57 Fed. 170; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *McGuire v. Great Northern R. Co.* 153 Fed. 434; *Lewis v. Cincinnati, N. O. & T. P. R. Co.* 192 Fed. 655.

What Must be Alleged and Shown in Trial of Issue.

It must appear that no cause of action is stated against the defendant alleged to be fraudulently joined; or that in law he has been improperly joined; or that the averments upon which he is joined are untrue so that a want of good faith in the joinder is apparent. *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745, 746; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, 638; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Offner v. Chicago & E. R. Co.* 78 C. C. A. 359, 148 Fed. 201; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209. General allegations are not sufficient. *Ibid.* See also *Durkee v. Illinois C. R. Co.* 81 Fed. 311; *Landers v. Felton*, 73 Fed. 311. Whether or not an allegation of a joint cause of action in the complaint is true or not may be put in issue by the petition for removal alleging a fraud-

ulent joinder to prevent removal. *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Bryce v. Southern R. Co.* 122 Fed. 709. See *Boatner v. American Exp. Co.* 122 Fed. 714.

How Issue Raised as to Diversity of Citizenship.

The issue as to whether there is diversity of citizenship upon which to base the removal is raised in the circuit court of the United States in the same manner as the issue is raised to defeat the original jurisdiction of the circuit courts, which has already been sufficiently discussed, together with the proof required.

If the original bill does not show diversity, and the petition to remove does not specifically set forth facts showing it, then a simple motion to remand can be made. If, however, the petition to remove sets forth facts showing diversity or that by shifting parties diversity would exist, or that there has been a collusion and fraudulent joinder of parties to prevent removal, then the motion to remand must take issue with the allegations of the petition for removal, which issues will be tried in the usual manner or as the court may direct. (See "Shifting Parties.") *Harrington v. Great Northern R. Co.* 169 Fed. 714; *Wetmore v. Rymer*, 169 U. S. 115-119, 42 L. ed. 682-684, 18 Sup. Ct. Rep. 293; *Boatmen's Bank v. Fritzlen*, 66 C. C. A. 288, 135 Fed. 650.

Removal by Aliens.

The question arises, Will a motion to remand a cause removed by an alien defendant be granted; or, in other words, can an alien remove a cause on the ground of his alienage?

I will briefly state the result of various cases in which the issue has been raised.

In *Texas v. Lewis*, 12 Fed. 1, in a controversy between a State and an alien defendant the case was held removable.

In 14 Fed. 65, the case was again heard with a similar result. These cases came under the second subdivision of Rev. Stat. sec. 639, which was repealed by the act of 1875, and not reinstated in the act of 1887.

In *Cudahy v. McGeoch*, 37 Fed. 1, it is held that an alien

sued in the State of his residence by citizens of another State cannot remove the case to the Federal court under the act of 1887. The ground was that the suit was not a suit between citizens of different States; and, secondly, that, though it was a suit between a citizen of a State and a foreign citizen, yet the foreign citizen was a resident of the State in which he was sued, and therefore did not come within the provisions of the removal act permitting only nonresident citizens to remove. *King v. Cornell*, 106 U. S. 398, 27 L. ed. 61, 1 Sup. Ct. Rep. 313; *Walker v. O'Neil*, 38 Fed. 375; *Eddy v. Casas*, 118 Fed. 363; *Hall v. Great Northern R. Co.* 197 Fed. 488.

By an examination of the act of 1888, section 2, affecting removals, two restrictions are attached to removals from a State to Federal courts: First. Removals are limited to cases in which the United States circuit court has original jurisdiction under section 1 of the act; and, second, the right to remove is limited to a *nonresident* defendant. New Code, secs. 24-28 (Comp. Stat. 1913, secs. 991-991(25), 1007-1010).

Now, by the first section of the act, jurisdiction is given to the circuit courts when the controversy is between a citizen of a State and foreign State citizens or subjects.

So, a citizen may sue an alien in the Federal court in the first instance, but if the alien should be sued in the State court his right to remove depends upon the second limitation as above stated, to wit, he must be a *nonresident* of the State in which he is sued to remove the case to the Federal court; otherwise he cannot remove, and a motion to remand will be granted. *Ibid.*; *Colley v. McArthur*, 35 Fed. 372; *Baumgarten v. Alliance Assur. Co.* 153 Fed. 301; *Holton v. Helvetia-Swiss F. Ins. Co.* 163 Fed. 660; *Wind River Lumber Co. v. Frankport Marine, Acci. & Plate Glass Ins. Co.* 116 C. C. A. 160, 196 Fed. 343.

But the question has arisen, Can a suit be removed from a State court in which a citizen of the State where the suit is brought has sued a nonresident citizen and alien jointly and both joining in the petition for removal? This identical question was raised in *Roberts v. Pacific & A. R. & Nav. Co.* 58 C. C. A. 61, 121 Fed. 785, and it was held that the suit could be removed, but it will be noticed that the conclusion of the court was based on the ground that both the citizen and alien

were nonresidents of the State in which the suit was brought, and if each had been sued separately could remove. But had the alien been a resident of the State, no removal could have been had unless the controversy was separable as to the nonresident citizen. This case repudiates the doctrine in *Black's Dillon on Removals*, secs. 68, 84, and seeks to avoid. *Tracy v. Morel*, 88 Fed. 803, and *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 313, referred to below, and minimizes the force of the word "wholly" in the act of 1888, sec. 2. However, an action by a nonresident against a citizen of the State; and alien is not removable. *Hackett v. Kuhne*, 157 Fed. 317, citing *Martin v. Snyder*, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706.

Another question arises, to wit: Can a suit be removed by an alien sued jointly with a citizen of a State on the ground that the controversy with the alien is separable? In *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. 257, the question is stated as a query, with the intimation by the court that the language of the act of 1887 entitled him to remove the cause if he be a nonresident alien. It says the test is actual interest in the separable controversy. In *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 2, it is held that the statute limits removals in a separable controversy to cases where it is *wholly* between citizens of different States, and an alien who is a party to a separable controversy can not remove, and conversely a nonresident defendant cannot remove, a separable controversy with an alien plaintiff. *Tracy v. Morel*, 88 Fed. 803, citing *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 313; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Woodrum v. Clay*, 33 Fed. 899; See *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 447; *H. G. Baker & Bro. v. Pinkham*, 211 Fed. 728.

So the rules may be stated:

First. That where an alien is sued alone in a State in which he does not reside, he may remove the cause to the Federal court as a "nonresident" defendant. *Attleboro Mfg. Co. v. Frankford Marine, Acci. & Plate Glass Ins. Co.* 202 Fed. 293; *Wind River Lumber Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 116 C. C. A. 160, 196 Fed. 340.

Second. That when an alien is sued jointly with a resident defendant in a State court, he cannot remove on the ground of a separate controversy, because the statute only permits a removal on the ground that the separable controversy must be *wholly* between citizens of different States.

Third. That in view of this act a *separable* controversy between an alien plaintiff and a nonresident defendant cannot be removed by the nonresident defendant.

Fourth. In view of the decision in *Roberts v. Pacific & A. R. Co.* 58 C. C. A. 61, 121 Fed. 785, if an alien is joined with a nonresident defendant, either of whom could remove if sued separately, then both may join in a removal to the Federal court. If, however, the alien joined with the nonresident defendant was a resident of the State in which he is sued, the case could not be removed.

Fifth. Where alien sues nonresident the latter may remove. *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 447; *Barlow v. Chicago & N. W. R. Co.* 164 Fed. 765; s. c. 172 Fed. 514-516; *Bagenas v. Southern P. R. Co.* 180 Fed. 888; *Rones v. Katalla Co.* 182 Fed. 946; *Smellie v. Southern P. R. Co.* 197 Fed. 642. The courts conflict on this question, many holding that nonresidents cannot remove unless by consent, because not a suit that could have been originally brought in the district courts of the United States. New Code, sec. 28 (Comp. Stat. 1913, sec. 1010). *Mahopoulus v. Chicago, R. I. & P. R. Co.* 167 Fed. 165; *Odhner v. Northern P. R. Co.* 188 Fed. 507; *Kamenicky v. Catterall Printing Co.* 188 Fed. 400; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 937-939, and cases cited.

Sixth. Any civil suit against any officer appointed under or acting by authority of any revenue law of the United States, brought in a State court, may be removed. New Code, sec. 33.

Seventh. Any personal action brought in a State court by an alien against an officer of the United States being a nonresident of that State, may be removed into the district court of the United States in and for the district in which the defendant was served with process. New Code, sec. 34. *Jackson v. William Kenefick Co.* 233 Fed. 130.

Removal by Corporations.

Corporations are citizens of the State granting their charters,

which determines citizenship in removals. *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1; *Lee v. Atlantic Coast Line R. Co.* 150 Fed. 776. See *Patch v. Wabash R. Co.* 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80, 12 Ann. Cas. 518; *Wasley v. Chicago, R. I. & P. R. Co.* 147 Fed. 608.

Who Can Remove the Case in Diversity of Citizenship.

When jurisdiction is based on diversity of citizenship, then the nonresident defendant may remove, or when more than one defendant, then all nonresident defendants *concurring* may remove (chap. 2, sec. 1, act of 1888; new Code, secs. 24-28 (Comp. Stat. 1913, secs. 991-991(25), 1007-1010). *State Trust Co. v. Kansas City P. & G. R. Co.* 110 Fed. 10; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 162, and cases cited; *Huntington v. Pinney*, 126 Fed. 237; *Blackburn v. Blackburn*, 142 Fed. 901; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 248, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 337, 45 L. ed. 221, 21 Sup. Ct. Rep. 171; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 182; *Parkinson v. Barr*, 105 Fed. 83, 84; *Thompson v. Chicago, St. P. & K. C. R. Co.* 60 Fed. 773; see *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 789, defining "nonresident" as used in the statute), and by the word "concurring" is meant that they must join in the petition for removal (*Ibid.*; *Yarnell v. Felton*, 104 Fed. 161, s. c. 102 Fed. 369), and the petition must show all the defendants are non-residents and concur in the application (*Parkinson v. Barr*, 105 Fed. 83, 84; *Bates v. Carpentier*, 98 Fed. 452), unless cause separable.

It is held, however, in *First Nat. Bank v. Bridgeport Trust Co.* 117 Fed. 969, that the failure of the husband to join where the subject-matter of the litigation was the wife's interest in property was immaterial, and where one is only a nominal defendant against whom no relief is prayed his failure to join in the application will not affect the removal. *Henderson v. Cabell*, 43 Fed. 257. See "Nominal Party."

There can be no removal on the ground of diversity of citi-

zenship when the State is a party (Postal Teleg. Cable Co. v. United States [Postal Teleg. Cable Co. v. Alabama] 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; Indiana use of Delaware County v. Alleghany Oil Co. 85 Fed. 870; Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 520, 42 L. ed. 1130, 18 Sup. Ct. Rep. 685; Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. [Missouri, K. & T. R. Co. v. Hickman] 183 U. S. 58, 46 L. ed. 80, 22 Sup. Ct. Rep. 18); nor when a nonresident is suing a nonresident in State court (Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150), unless the plaintiff assents (Moyer v. Chicago, M. & St. P. R. Co. 168 Fed. 105); but if removed, the objection is waived (Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 14 Ann. Cas. 1164; Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720). See chapter 126; Stewart v. Cybur Lumber Co. 211 Fed. 343; Baldwin v. Pacific Power & Light Co. 199 Fed. 293, 294.

Again, where the suit is instituted in a State court of a State of which neither party is a resident, if removal is had, it must be to the Federal district court of the Federal district in which defendant resides. Thus, a suit brought by a citizen of Vermont against a citizen of Massachusetts in a New York State court cannot be removed to a Federal court in New York, but to the district of defendant's residence. Mattison v. Boston & M. R. Co. 205 Fed. 821; Stewart v. Cybur Lumber Co. 211 Fed. 344. You cannot remove a cause into a Federal court unless it is one that could have been originally brought there. Younts v. Southwestern Teleg. & Teleph. Co. 192 Fed. 200; Waterman v. Chesapeake & O. R. Co. 199 Fed. 667.

Joinder of Defendants Not Served.

When the cause of action in which a defendant not served is joint, the nonresident served cannot remove as if a separable controversy (Patchin v. Hunter, 38 Fed. 51; Ames v. Chicago, S. F. & C. R. Co. 39 Fed. 881. See Putnam v. Ingraham, 114 U. S. 59, 29 L. ed. 66, 5 Sup. Ct. Rep. 746; Wilson v.

Oswego Twp. 151 U. S. 66, 38 L. ed. 75, 14 Sup. Ct. Rep. 259; Sinclair v. Pierce, 50 Fed. 852; Carlisle v. Sunset Teleph. & Teleg. Co. 116 Fed. 896), unless there is an allegation of fraudulent joinder and no issue joined, says the court in Dishon v. Cincinnati, N. D. & T. P. R. Co. 133 Fed. 471; Union Terminal R. Co. v. Chicago, B. & Q. R. Co. 119 Fed. 209. See "Effect of Removal on Service in State Court."

In Tremper v. Schwabacher, 84 Fed. 415, the case rested upon the fact that the nature of the joint interest was one of copartnership, and therefore held that the other partners not being served would not prevent a removal by the nonresident partner served. Diday v. New York, P. & O. R. Co. 107 Fed. 569. If, however, it is removed and tried without objection, a severance will be presumed. Guarantee Co. v. Mechanics Sav. Bank & T. Co. 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766.

If one joint defendant loses the right to remove, it cannot be exercised by the others in the absence of a separable controversy. Calderhead v. Downing, 103 Fed. 27; Fletcher v. Hamlet, 116 U. S. 410, 29 L. ed. 679, 6 Sup. Ct. Rep. 426; Brooks v. Clark, 119 U. S. 513, 30 L. ed. 485, 7 Sup. Ct. Rep. 301; Abel v. Book, 120 Fed. 47; Rogers v. Van Nortwick, 45 Fed. 514.

Misjoinder.

Where there is a misjoinder of parties their presence may be disregarded in removal. Iowa Lillioet Gold Min. Co. v. Bliss, 144 Fed. 447; Politz v. Wabash R. Co. 153 Fed. 942; S. C. 100 C. C. A. 1, 176 Fed. 333; Helms v. Northern P. R. Co. 120 Fed. 395, and by misjoinder is meant that no cause of action is stated against some of the defendants.

Nominal Parties.

Nominal parties, or parties against whom no relief is prayed, need not join in applying for removal, or it may be stated their failure to join in the petition for removal would not affect it (Reeves v. Corning, 51 Fed. 778; Johnston R. Frog & Switch Co. v. Buda Foundry & Mfg. Co. 148 Fed. 883; Cella v.

Brown, 75 C. C. A. 608, 144 Fed. 742; Reese v. Zinn, 103 Fed. 97; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; First Nat. Bank v. Bridgeport Trust Co. 117 Fed. 969; Loop v. Winters, 115 Fed. 362; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 606, 607; Parkinson v. Barr, 105 Fed. 81; Higgins v. Baltimore & O. R. Co. 99 Fed. 640; Geer v. Mathieson Alkali Works, 190 U. S. 434, 47 L. ed. 1125, 23 Sup. Ct. Rep. 807; Carver v. Jarvis-Conklin Mortg. Trust Co. 73 Fed. 9; Missouri use of Public Schools v. Alt, 73 Fed. 302), as when defendant has only an option (Garrard v. Silver Peak Mines, 76 Fed. 1; Richardson v. Southern Idaho Water Power Co. 209 Fed. 949.)

When Controversy Separable.

While the rule, as given, that all the nonresident defendants must join the removal, or the court will remand (Bates v. Carpentier, 98 Fed. 453; Moore v. Los Angeles Iron & Steel Co. 89 Fed. 78; Colburn v. Hill, 41 C. C. A. 467, 101 Fed. 500; Knight v. Litcher & M. Lumber Co. 69 C. C. A. 248, 136 Fed. 405, yet the rule is not applicable if there be a separable controversy between plaintiffs and one or more of the defendants, as heretofore explained; the nonresident defendant having the separate controversy may remove the case. Parkinson v. Barr, 105 Fed. 83, 84, and authorities cited; see clause 3, sec. 2, act 1875 amended by act 1888; Bates v. Carpentier, 98 Fed. 452; New England Waterworks Co. v. Farmers' Loan & T. Co. 69 C. C. A. 297, 136 Fed. 525; Chicago, R. & P. R. Co. v. Martin, 178 U. S. 247, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; Laden v. Meek, 65 C. C. A. 361, 130 Fed. 877; American Bridge Co. v. Hunt, 64 C. C. A. 548, 130 Fed. 303; Harding v. Standard Oil Co. 170 Fed. 651; Batey v. Nashville C. & St. L. R. Co. 95 Fed. 368; new Code, secs. 24-28 (Comp. Stat. 1913, secs. 991-991 (25), 1007-1010); Maloney v. Cressler, 126 C. C. A. 618, 210 Fed. 1097 and cases cited; Casey v. Baker, 212 Fed. 255, and cases cited; Buck v. Felder, 196 Fed. 421; Re Silvies River, 199 Fed. 501. Separate defenses, as we have heretofore seen, do not create a separable controversy. Graves v. Corbin, 132 U. S. 588; 33 L. ed. 468, 10 Sup. Ct. Rep. 196; Fidelity Ins. Trust & S. D. Co. v. Huntington, 117

U. S. 281, 29 L. ed. 899, 6 Sup. Ct. Rep. 733; *Thurber v. Miller*, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 375; *Torrence v. Shedd*, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726.

In equity the question of the existence of a separable controversy must be determined from the allegations of the bill, independent of the petition for removal. *Elkins v. Howell*, 140 Fed. 157, 159 and cases cited. *Graves v. Corbin*, 132 U. S. 585, 33 L. ed. 467, 10 Sup. Ct. Rep. 196. So also in tort. See *Cleveland v. Cleveland*, C. C. & St. L. R. Co. 77 C. C. A. 467, 147 Fed. 171; *Blunt v. Southern R. Co.* 155 Fed. 500; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *Fogarty v. Southern P. Co.* 123 Fed. 973, 974; *Galleotti v. Diamond Match Co.* 178 Fed. 127; *Coram v. Davis*, 182 Fed. 939; *Davey v. Yolo Water & Power Co.* 211 Fed. 345; *West Side R. Co. v. California P. R. Co.* 200 Fed. 333.

To avoid repetition I must refer you to the discussion of a separable controversy and illustrative cases, as they apply to removal of causes as stated in the act of 1888, sec. 1. See for illustration *Miller v. Clifford*, 5 L.R.A.(N.S.) 49, 67 C. C. A. 52, 133 Fed. 881; *Oroville & N. R. Co. v. Leggett*, 162 Fed. 572; *Manufacturers' Commercial Co. v. Brown Alaska Co.* 148 Fed. 308; *Elkins v. Howell*, 140 Fed. 157; *Heffelfinger v. Choctaw, A. & G. R. Co.* 140 Fed. 75; *Blackburn v. Blackburn*, 142 Fed. 901; *Lathrop, S. & H. Co. v. Interior Constr. & Improv. Co.* 143 Fed. 687; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 311; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Peninsular Iron Co. v. Stone*, 121 U. S. 632, 633, 30 L. ed. 1020, 1021, 7 Sup. Ct. Rep. 1010; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; *MacGinniss v. Boston & M. Consol. Copper & S. Min. Co.* 55 C. C. A. 648, 119 Fed. 96; *Hanover Nat. Bank v. Credits Commutation Co.* 118 Fed. 110; *State Trust Co. v. Kansas City, P. & G. R. Co.* 110 Fed. 10; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Miller v. LeMars Nat. Bank*, 116 Fed. 551.

Where the case is removed by one defendant on the ground of a separable controversy, you may dismiss as to him in order

to remand the case. *Youtsey v. Hoffman*, 108 Fed. 699; *McCabe v. Southern R. Co.* 107 Fed. 213; *Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1261; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183.

An alien, as we have seen, cannot remove on the ground of a separable controversy. (See "Removal by Aliens.")

Removal in Cross Suit.

In cross suit the original plaintiff becomes defendant, and he may remove if conditions exist that would give the right of removal if suit had been originally filed against him. *Kirby v. American Soda Fountain Co.* 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619; *Hagerla v. Mississippi River Power Co.* 202 Fed. 775, and cases cited. In *Nash v. McNamara*, 145 Fed. 541, it is said that parties brought into a suit by cross bill in a State court cannot remove. (See "Intervention for "Removal.") See p. 855.

Tort Feasors.

Where tort feasors are joined, one cannot remove on the ground of a separable controversy. *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Blunt v. Southern R. Co.* 155 Fed. 499; *Shaffer v. Union Brick Co.* 128 Fed. 101; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Dougherty v. Atchison, T. & S. F. R. Co.* 126 Fed. 240; *Keller v. Kansas City, St. L. & C. R. Co.* 135 Fed. 202; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 452; *Knuth v. Butte Electric R. Co.* 148 Fed. 73; *Alabama, G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *American Bridge Co. v. Hunt*, 64 C. C. A. 548, 130 Fed. 302; *International & G. N. R. Co. v. Hoyle*, 79 C. C. A. 128, 149 Fed. 181; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 960; *Person v. Illinois C. R. Co.* 118 Fed. 342; *Willard v. Spartanburg, U. & C. R. Co.* 124 Fed. 797; *Weaver* S. Eq.—52.

v. Northern P. R. Co. 125 Fed. 155; Marrs v. Felton, 102 Fed. 775; Ward v. Franklin, 110 Fed. 794; Rupp v. Wheeling & L. E. R. Co. 58 C. C. A. 161, 121 Fed. 825; Willard v. Chicago, B. & Q. R. Co. 91 C. C. A. 215, 165 Fed. 181; Richardson v. Southern Idaho Water Power Co. 209 Fed. 953; Buchanan v. W. M. Ritter Lumber Co. 126 C. C. A. 658, 210 Fed. 144. The separable controversy must be determined by the face of the pleading. Thresher v. Western U. Teleg. Co. 148 Fed. 651; Fogarty v. Southern P. Co. 123 Fed. 973, 974; Riser v. Southern R. Co. 116 Fed. 215. But where a corporation sues for damages alleged to have been sustained by the corporation by reason of the officers' misconduct, and no conspiracy is alleged, the action is severable. Sessions v. Southern P. Co. 134 Fed. 313; Davenport v. Southern R. Co. 68 C. C. A. 444, 135 Fed. 962, and cases cited; Youtsey v. Hoffman, 108 Fed. 693.

Again, where two corporations are sued for a personal injury from falling down an elevator, one being sued as owner of the building and the other as having negligently built the elevator, it was held the cause was separable. Coker v. Monaghan Mills, 110 Fed. 803.

So it has been held that a joint action cannot be maintained against a railroad company and an employer to recover for an injury resulting solely from the negligence of the employee; the causes of action, being based on separate grounds, are distinct, and present a separable controversy. Helms v. Northern P. R. Co. 120 Fed. 389; Sessions v. Southern P. Co. 134 Fed. 313; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 909; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 87, 88; See Knuth v. Butte Electric R. Co. 148 Fed. 73; See Morris v. Louisville & N. R. Co. 175 Fed. 491; McAllister v. Chesapeake & O. R. Co. 198 Fed. 660; Armstrong v. Kansas City Southern R. Co. 192 Fed. 608; Macutis v. Cudahy Packing Co. 203 Fed. 291.

By referring to *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, 643, it will be seen that up to the date of its delivery the authorities were conflicting, and it seems that the cases have been differentiated and a rule of construction applied to determine when the controversy in an action against

the employer and employee for a personal injury can be made separable.

The rule is that in all cases where the master is sought to be made liable for the negligent or wrongful act of his servant solely on the ground of his relationship as master, under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act by his presence, or express direction, he is liable severally only, and not jointly with his servant. *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 641, 642; *Sessions v. Southern P. Co.* 134 Fed. 315; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 93-96; *Shaffer v. Union Brick Co.* 128 Fed. 102. See *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 474; and *Charman v. Lake Erie & W. R. Co.* 105 Fed. 454; *Adderson v. Southern R. Co.* 177 Fed. 571; *Jackson v. Chicago, R. I. & P. R. Co.* 102 C. C. A. 159, 178 Fed. 432.

There must be some community in the wrong doing among the parties united as codefendants, and a co-operation in fact, and not a mere joint responsibility and based on entirely different grounds and presenting two causes of action in the same complaint. *Helms v. Northern P. R. Co.* 120 Fed. 394; *Shaffer v. Union Brick Co.* 128 Fed. 101. See *Knuth v. Butte Electric R. Co.* 148 Fed. 73; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 967. As to the rule when the law of the State permits it, see *Charman v. Lake Erie & W. R. Co.* 105 Fed. 449, 454; *Helms v. Northern P. R. Co.* 120 Fed. 397, 398.

Again, it has been held that the employee is not liable to third persons for a *nonperformance* of duty, but only for acts of positive wrong and negligence; thus, an employee charged with the inspection of engines cannot be joined with the company as defendant, so as to prevent a removal of the cause to the Federal court. *Ibid.*; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286. See *Helms v. Northern P. R. Co.* 120 Fed. 396, 397. See *Riser v. Southern R. Co.* 116 Fed. 216, 217, citing *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67 (See "Joint and Several Liability.")

The Whole Case is Removed.

When a case is removed on the ground of a separable con-

troversy, the whole case under the act of 1875 is taken up. *Barney v. Latham*, 103 U. S. 212-216, 26 L. ed. 517-518; *Hoge v. Canton Ins. Office*, 103 Fed. 513; *Hyde v. Ruble*, 104 U. S. 407, 26 L. ed. 823; *Atlantic & V. Fertilizing Co. v. Carter*, 88 Fed. 708; *Brooks v. Clark*, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; see *Youtsey v. Hoffman*, 108 Fed. 699. The case would be remanded if only the separable controversy was taken up. U. S. Rev. Stat. sec. 639, act of 1866 was repealed by the act of 1875; *Hyde v. Ruble*, 104 U. S. 407, 26 L. ed. 823. See *Deepwater R. Co. v. Western Pochontas Coal & Lumber Co.* 152 Fed. 830, 831, where a distinction is drawn between a "separate controversy" and the joinder of wholly distinct cause of action; in the latter case the rule does not apply.

Substance of Petition to Remove.

The petition to remove on the ground of separable controversy must show that there is in said suit a controversy wholly between citizens of different States, and which can be fully determined as between them. It should show the citizenship clearly, and not by inference, of the parties between whom the separable controversy exists. It should be determined by the condition of the record in the State court at the time of filing the petition for removal. *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 965, 966; *Carp v. Queen Ins. Co.* 168 Fed. 782; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839; *Jones v. Adams Exp. Co.* 129 Fed. 618; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Thompson v. Stalman*, 131 Fed. 811. See *Elkins v. Howell*, 140 Fed. 157, holding that in a suit in equity the separable controversy must be determined from the bill alone. *Atlanta, K. & N. R. Co. v. Southern R. Co.* 82 C. C. A. 256, 153 Fed. 122, 11 A. & E. Ann. Cas. 766.

It should show the nature of the controversy, and that the relief asked as between the parties to the separable controversy would not affect the others; in a word, that in the issue only

petitioner and plaintiff are interested, and then should follow a prayer for removal. *Smedley v. Smedley*, 110 Fed. 257.

It must speak in exact language of the removal act (*Barth v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, 60 Fed. 469), in using the words "citizen," "resident" and "inhabitant." *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578; *Freeman v. Butler*, 30 Fed. 1.

If, however, the separable controversy is settled by stipulations, the cause should be remanded. *Bane v. Keefer*, 66 Fed. 612; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726. Need not be verified. *Harley v. Home Ins. Co.* 125 Fed. 792. See for form, 110 Fed. 257.

CHAPTER CXX.

REMOVAL ON GROUND OF FEDERAL QUESTION.

When a Federal question is set up, upon which the removal is based, the mere allegation in the petition that a Federal question exists is not sufficient. The plaintiff's claim as set forth by himself must also show the Federal question, for if the court cannot find the Federal question in the statements of the claim made, it must remand without reference to the allegation that one exists. Nor can any statement in the *petition for removal* or in any subsequent pleading help the case, 25 Stat. at L. 433, chap. 866 (Comp. Stat. 1913, sec. 1010); *People's United States Bank v. Goodwin*, 160 Fed. 727; *Oregon v. Three Sisters Irrig. Co.* 158 Fed. 346; *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 564; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 763; *Arkansas v. Choctaw & M. R. Co.* 134 Fed. 107; *Dewey Min. Co. v. Miller*, 96 Fed. 1; *California Oil & Gas Co. v. Miller*, 96 Fed. 12; *New Castle v. Postal Teleg. Cable Co.* 152 Fed. 572, 573; *Broadway Ins. Co. v. Chicago, G. W. R. Co.* 101 Fed. 508; *Mayo v. Dockery*, 108 Fed. 897; *South Carolina v. Virginia-Carolina Chemical Co.* 117 Fed. 728; *Wichita v. Missouri & K. Teleg. Co.* 122 Fed. 100; *Minnesota v. Northern Securities Co.* 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598; *Postal Teleg Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama)* 155 U. S. 482-487, 39 L. ed. 231-233, 15 Sup. Ct. Rep. 192; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Caples v. Texas & P. R. Co.* 67 Fed. 9. (See "How Federal Question Must Appear," chapter 27); *Western U. Teleg. Co. v. Southeast & St. L. R. Co.* 125 C. C. A. 466, 208 Fed. 266; *Leggett v. Great Northern R. Co.* 180 Fed. 314; *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Bowers v. First Nat. Bank*, 190 Fed. 677; *W. C. Coyle & Co. v. Stern*,

113 C. C. A. 450, 193 Fed. 586; Rural Home Teleph. Co. v. Powers, 176 Fed. 986. And it seems the State court may refuse to remove the case on this ground. Galveston, H. & S. A. R. Co. v. Texas, 170 U. S. 235, 42 L. ed. 1020, 18 Sup. Ct. Rep. 603.

However, it seems that there is a class of cases when the Federal question may be set up in the petition to remove the case, as when the petition fails to assert the fact that would give the Federal court jurisdiction, in order to evade the jurisdiction of these courts. See *Winters v. Drake*, 102 Fed. 545, as to proper application of the rule permitting removal though Federal question does not appear in the bill.

Nor will a mere attack on a State statute make a case under the removal act. *Ralya Market Co. v. Armour & Co.* 102 Fed. 530; see "Federal Question" for further discussion.

Where the Supreme Court has decided the particular question of law upon which the suit is based, it ceases to be a Federal question for removal purposes. *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 195, 196, and cases cited.

Who May Remove on Ground of Federal Question.

The defendant or *all* of the defendants *concurring* must make the application (sec. 1, clause 1, act of 1888; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; explains and modifies *Mitchell v. Smale*, 140 U. S. 406, 55 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Martin v. St. Louis, Southwestern R. Co.* 134 Fed. 135, 136; *Yarnell v. Felton*, 104 Fed. 161, S. C. 102 Fed. 369; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 180-182; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75), unless, as before stated, the controversy with the moving defendant is separable, then the application need not be joint (*Yarnell v. Felton*, 102 Fed. 370; *Parkinson v. Barr*, 105 Fed. 83; *Gates Iron Works v. James E. Pepper & Co.* 98 Fed. 449).

CHAPTER CXXI.

AMOUNT AS GROUND FOR MOTION TO REMOVE.

We have seen that one of the fundamental grounds of jurisdiction in the Federal courts is the amount of value of the subject-matter in controversy, and this must appear in the petition of plaintiffs, or in the application for removal (*Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* 89 Fed. 113; *Order of R. R. Telegraphers v. Louisville & N. R. Co.* 148 Fed. 437; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578-582; *King v. Southern R. Co.* 119 Fed. 1016; *Southern Cash Register Co. v. National Cash Register Co.* 143 Fed. 659; *Southern Cash Register Co. v. Montgomery*, 143 Fed. 700; *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 137. See *Porter v. Northern P. R. Co.* 161 Fed. 773, 774, and *Davis v. Wells*, 134 Fed. 139, as to value in action of ejectment. *Johnson v. Wells, F. & Co.* 91 Fed. 1; *Daugherty v. Sharp*, 171 Fed. 466; *New Castle v. Western U. Teleg. Co.* 152 Fed. 571; *Simmons v. Mutual Reserve Fund Life Asso.* 114 Fed. 785; *Lord v. DeWitt*, 116 Fed. 713; *Baltimore v. Postal Teleg. Cable Co.* 62 Fed. 500; *Western U. Teleg. Co. v. White*, 102 Fed. 705; see ("Amount to Give Jurisdiction"), and as alleged is sufficient if not colorable. (*Ibid.*; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Wakeman v. Throckmorton*, 124 Fed. 1010; See *Smith v. Western U. Teleg. Co.* 79 Fed. 132; *Martin v. City Water Co.* 197 Fed. 465).

The amount or value in controversy must exceed three thousand dollars, exclusive of interest and costs (new Code, sec. 24 (Comp. Stat. 1913, sec 991), or the case cannot be removed to the Federal court (*Johnson v. Wells, F. & Co.* 91 Fed. 1; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; *Simmons v. Mutual Reserve Fund*

Life Asso. 114 Fed. 785; *Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232; *E. A. Holmes & Co. v. United States F. Ins. Co.* 142 Fed. 863; *Memphis v. Postal Teleg. Cable Co.* 76 C. C. A. 292, 145 Fed. 602; *Amelia Mill Co. v. Tennessee Coal, Iron & R. Co.* 123 Fed. 811; *Chambers v. McDougal*, 42 Fed. 694; *Stadleman v. White Line Towing Co.* 92 Fed. 209; *Langdon v. Hillside Coal & I. Co.* 41 Fed. 609; *Detroit v. Detroit City R. Co.* 54 Fed. 5), whether jurisdiction is based on diversity of citizenship or a Federal question, and the amount must be determined by the Federal court (*Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 803), and the burden is on the defendant. *New Castle v. Western U. Teleg. Co.* 152 Fed. 569.

The amount at the time of filing the application to remove, must exceed three thousand dollars, as above stated (*Riggs v. Clark*, 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 563; *Maine v. Gilman*, 11 Fed. 214; *Carrick v. Landman*, 20 Fed. 209; *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* 89 Fed. 113; *Western U. Teleg. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312); but the question arises how far the plaintiff in the State court can diminish the amount to prevent removal.

Whatever may have been the original demand, the plaintiff can diminish the amount before the bond perfecting the application for removal has been filed, and his motive does not affect his right. *Maine v. Gilman*, 11 Fed. 215, 216; *Coffin v. Philadelphia, W. & B. R. Co.* 118 Fed. 688. However in *Peterson v. Chicago, M. & St. P. R. Co.* 108 Fed. 561, it was held that where the original petition in the State court was based on a claim of ten thousand dollars, but was amended, reducing the amount to nineteen hundred and ninety-nine dollars, and the amendment was not served as required by the State law, before the application for removal was filed, that this reducing the amount by amendment would not prevent the removal. The decision, however, is extremely technical, and not supported by reason in view of the facts of the case.

After the petition and bond for removal has been filed the jurisdiction of the Federal court attaches, and plaintiff cannot diminish his demand to defeat the Federal jurisdiction. *Johnson v. Computing Scale Co.* 139 Fed. 339; *Hayward v. Nord-*

berg Mfg. Co. 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4-9; Donovan v. Dixieland Amusement Co. 152 Fed. 661; Coffin v. Philadelphia, W. & B. R. Co. 118 Fed. 688; Waite v. Phoenix Ins. Co. 62 Fed. 769. The claim made at the time the removal takes place determines the jurisdiction for removal, but see exception to the rule, Hughes v. Pepper Tobacco Warehouse Co. 126 Fed. 687, where mistake in stating amount was shown. The fact that the amount is reduced below two thousand dollars by an attack on items would be no ground to remand, unless good faith attacked. Roessler-Hasslachner Chemical Co. v. Doyle, 73 C. C. A. 174, 142 Fed. 118; Levinski v. Middlesex Bkg. Co. 34 C. C. A. 452, 92 Fed. 449. The party removing cannot attack amount to show want of jurisdiction. Smith v. Western U. Teleg. Co. 79 Fed. 132; Eustis v. Henrietta, 20 C. C. A. 537, 41 U. S. App. 182, 74 Fed. 577.

Effect of Filing Counterclaim.

The jurisdiction depends on the amount in controversy, as stated in the original petition in the State court, and not the counterclaim of the defendant, is said to be the rule in Illinois C. R. Co. v. Waller, 164 Fed. 359; Falls Wire Mfg. Co. v. Broderick, 2 McCrary, 489, 6 Fed. 654; Indiana Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. 135 Fed. 837; La Montagne v. T. W. Harvey Lumber Co. 44 Fed. 645; Bennett v. Devine, 45 Fed. 705; McKown v. Kansas & T. Coal Co. 105 Fed. 657; Waco Hardware Co. v. Michigan Stove Co. 33 C. C. A. 511, 63 U. S. App. 396, 91 Fed. 289. But it was held *contra* in Clarkson v. Manson, 18 Blatchf. 443, 4 Fed. 257. Price v. Ellis, 129 Fed. 482, reviewing the cases and concluding that the plaintiff may remove at and before the time he is called to plead to the counterclaim. The cases are conflicting and irreconcilable, but the better rule is that the original petition fixes the amount upon which jurisdiction to remove depends. Nor can the nonresident plaintiff, being defendant in the counterclaim, remove, McKown v. Kansas, & T. Coal Co. 105 Fed. 658. However, the query is presented in this case, whether the right of the nonresident plaintiff to remove would not exist, if under the State law he was required to plead to a counterclaim.

CHAPTER CXII.

MUST BE A SUIT OF A CIVIL NATURE.

As to what is a suit of a civil nature, was said in *Weston v. Charleston*, 2 Pet. 449-464, 7 L. ed. 481-487, to apply to any proceeding in which one pursues in a court of justice a remedy which the law gives him to secure the right litigated. *Re Jarnecke Ditch*, 69 Fed. 166. *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 140; *Upshur County v. Rich*, 135 U. S. 474, 34 L. ed. 199, 10 Sup. Ct. Rep. 651; *Re Stutsman County*, 88 Fed. 337; *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 682; *Gruetter v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 249; *Elk Garden Co. v. T. W. Thayer Co.* 179 Fed. 556; *Gruetter v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 249.

Proceedings in garnishment is a removable suit. *Baker v. Duwamish Mill Co.* 149 Fed. 612. Suit for condemnation is a suit of a civil nature. *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 790, 791, and cases cited; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. So is a claim for alimony. *Israel v. Israel*, 130 Fed. 238, 239, and cases cited.

Again, a suit to probate a will has been held not to be a suit of a civil nature within the meaning of the first section of the act of 1888, and therefore cannot be removed. (See "Probate Jurisdiction," chapter 42, p. 246; *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 683; *Re Cilley*, 58 Fed. 977; *Copeland v. Bruning*, 72 Fed. 5-8; *Re Aspinwall*, 83 Fed. 851.

So a suit or proceeding in a probate court to determine whether property is separate or community is not a suit of a civil nature within the removal act. *Re Foley*, 80 Fed. 949. But not a suit to annul a will as a muniment of title. *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 227, and cases cited. So a suit to enforce penalties for a violation of a "State statute is not a suit of a civil nature." *Indiana use of Delaware*

County v. Alleghany Oil Co. 85 Fed. 870; Arkansas v. St. Louis & S. F. R. Co. 173 Fed. 574; South Carolina v. Virginia Chemical Co. 117 Fed. 727, 728; Moloney v. American Tobacco Co. 72 Fed. 801. So a proceeding for an original writ of mandamus is not. Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 3; Mystic Milling Co. v. Chicago, M. & St. P. R. Co. 132 Fed. 289. So to test the title to an office in a corporation organized in a State. Place v. Illinois, 16 C. C. A. 300, 18 U. S. App. 724, 69 Fed. 481. So an appeal from board of commissioners assessing taxes. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 140, 141; Upshur County v. Rich, 135 U. S. 470-477, 34 L. ed. 197-200, 10 Sup. Ct. Rep. 651; Re Chicago, 64 Fed. 899. So a Federal court cannot exercise the function of *parens patriæ* for the determination of the right to custody, as, for instance, an insane person. Hoadly v. Chase, 126 Fed. 818. This authority resides in the States. Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 3, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; Fountain v. Ravenel, 17 How. 369-384, 15 L. ed. 80-86; King v. McLean Asylum, 26 L.R.A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 351. Nor where the suit deals with a fund in a State court. Daugherty v. Sharp, 171 Fed. 466.

The Suit Must Be One That Could Be Originally Brought in the Federal Court.

By sec. 1 of the Act of 1888, now new Code, sec. 28 (Comp. Stat. 1913, sec. 1010), it is provided that any suit arising under the Constitution and laws of the United States, of which the circuit courts of the United States are given original jurisdiction under section 1 of the act, can be removed by the defendant; and all other suits of a civil nature, of which the circuit courts are given jurisdiction by section 1 of the act, new Code, sec. 24 (Comp. Stat. 1913, sec. 991), may be removed by the defendant or defendants if *nonresidents*. Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Re Winn, 213 U. S. 458-464, 53 L. ed. 873-875, 29 Sup. Ct. Rep. 515; citing Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed.

626, 23 Sup. Ct. Rep. 434, and *Ex parte Wisner*, supra; *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 681, 682, and cases cited; *Kansas City & T. R. Co. v. Interstate Lumber Co.* 37 Fed. 6, 7; *Carp v. Queen Ins. Co.* 168 Fed. 782; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994; *Southern P. Co. v. Burch*, 82 C. C. A. 34, 152 Fed. 168; *Goldberg, B. & Co. v. German Ins. Co.* 152 Fed. 832; *Yellow Aster Min. & Mill. Co. v. Crane Co.* 80 C. C. A. 566, 150 Fed. 580; *Blunt v. Southern R. Co.* 155 Fed. 499; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992, 993; *Kentucky v. Chicago I. & L. R. Co.* 123 Fed. 458; *Minnesota v. Northern Securities Co.* 194 U. S. 63, 64, 48 L. ed. 877, 878, 24 Sup. Ct. Rep. 598; *Foulk v. Gray*, 120 Fed. 156; *Eddy v. Casas*, 118 Fed. 364; *Baldwin v. Pacific Power & Light Co.* 199 Fed. 291; *Waterman v. Chesapeake & O. R. Co.* 199 Fed. 667; *Gruetter v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 249; *Canary Oil Co. v. Standard Asphalt & Rubber Co.* 182 Fed. 664; *Younts v. Southwestern Teleg. & Teleph. Co.* 192 Fed. 200; *Anderson v. Sharp*, 189 Fed. 247; *H. G. Baker & Bro. v. Pinkham*, 211 Fed. 728.

We thus see the right of removal is limited to such suits as could have been originally brought in the United States circuit courts under the first section of the jurisdictional act, which has already been discussed. While this was not the rule under the acts of 1789 and 1875, yet section 1 of the act of 1888, sec. 28 new Code, made a radical change in the right of removal by confining it to those suits that could be originally brought in the Federal court (*Foulk v. Gray*, 120 Fed. 161-163; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 Ann. Cas. 451; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 240, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Blunt v. Southern R. Co.* 155 Fed. 499; *Re Cilley*, 58 Fed. 978, 979), and in which four things are necessary:

First. It has to be a suit of a civil nature in law or equity.

Second. It must involve a sum or value in controversy exceeding three thousand dollars, exclusive of interest and costs. See "Amount as Ground for Remanding."

Third. It must arise between citizens of different States or under one of the conditions set forth in the first clause of that section, and not falling within any exception to the jurisdiction as contained in that act.

To illustrate: There is excepted out of the jurisdiction of the United States circuit court by the twenty-fourth section of the new Code any suit by an assignee of a chose in action, if such instrument be payable to bearer and not made by a corporation (and not a foreign bill of exchange) to recover the contents of such chose in action, unless such suit might be brought by the assignor in the Federal court. Therefore, if the assignor could not sue in the Federal court the case cannot be removed, though as between the assignee and defendant there be diversity of citizenship. *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 647.

It had been frequently held that the circuit court would entertain a controversy removed from a State court, notwithstanding the fact that neither the plaintiff nor the defendant was resident within the district where the suit was brought, that the right of removal by the nonresident defendant had no relation to that clause of the act relating to the district in which the suit was brought, and consequently a class of cases arose where the removal was sustained though the suit could not have been originally brought in the Federal district.

Thus, citizens of different States may sue each other in a State court; in such case the nonresident defendant may remove the case to the Federal court of the district in which the suit is brought, though these nonresident citizens could not, by reason of the restriction on residence, have maintained the suit in the Federal court to which it was removed, as an original suit. *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* 108 Fed. 454; *Manufacturer Commercial Co. v. Brown Alaska Co.* 148 Fed. 312, and cases cited; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 996, 997; *Kansas City & T. R. Co. v. Interstate Lumber Co.* 37 Fed. 3; *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* 130 Fed. 585; *Cowell v. City Water-Supply Co.* 96 Fed. 769; *Robert v. Pine-land Club*, 139 Fed. 1001.

The theory was that the restrictive clause of the act is only a

privilege which the defendant may plead, or waive, if sued out of his district, and by his petition and removal he waives the privilege and invokes the jurisdiction of the court. *Foulk v. Gray*, 120 Fed. 157.

The plaintiff could not object, as the right of removal is intended for the benefit of the nonresident defendant, and he may exercise the right if the grounds exist, without the remotest reference to the wishes of the plaintiff. *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* 108 Fed. 454; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Duncan v. Associated Press*, 81 Fed. 421; *Burch v. Southern P. Co.* 139 Fed. 350; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 847; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 849; *Empire Min. Co. v. Propellor Tow-Boat Co.* 108 Fed. 900; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155, 21 Sup. Ct. Rep. 109; *Cowell v. City Water-Supply Co.* 96 Fed. 769. And the filing of the petition and bond for removal waived the right of the defendant to be sued in his district. *Whitworth v. Illinois C. R. Co.* 107 Fed. 557; *Faulk v. Gray*, 120 Fed. 157; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96.

We see from the foregoing that there has been much conflict of authority, but the stronger current was in favor of the rule "that suit must be brought in defendant's residence district, or in plaintiff's district if jurisdiction depended on diversity of citizenship, or in defendant's resident district if jurisdiction rested on a Federal question" did not apply to removals. Such was the understanding of the profession until the doctrine of the earlier cases was revised in *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150. *Wisner*, a citizen of Michigan, sued *Beardsley*, a citizen of Louisiana, in the State Court in St. Louis, Missouri; the defendant filed his petition for removal to the United States circuit court for the eastern district of Missouri, on the ground of diversity of citizenship. The motion to remand was refused on the authority of *Foulk v. Gray*, 120 Fed. 156, and *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* 130 Fed. 585. An appeal was taken to the Supreme Court in the nature of a petition for prohibition and mandamus by *Wisner* on the ground that the circuit court had no jurisdiction.

The court granted the writ of mandamus, ordering the circuit court to remand the case upon the ground that a citizen of one State suing a citizen of another State in a third State is not a removable case, as such suit could not have been originally brought in the Federal circuit court under sec. 1 of the jurisdictional and removal act of 1888. The Chief Justice referred to the earlier cases for support, but unquestionably arrested the trend of authority as developed in the circuit courts, and states without reservation that the removal by a nonresident defendant contemplated that the suit must have been brought by the plaintiff in the State and district of plaintiff's citizenship. *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 996, 997. Subsequently *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164, came before the Supreme Court, involving the same questions. It was held that nothing in *Ex parte Wisner*, *supra*, changed the rule that parties may waive the objection that the case was not brought in or removed to the particular Federal court required by statute. That where both parties consent to the jurisdiction of the Federal Court, as evidenced by the defendant in filing his petition and bond for removal, and by the plaintiff amending his pleading without challenging the jurisdiction or proceeding to trial, then the Federal court could proceed to judgment. *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 369, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; *Moyer v. Chicago, M. & St. P. R. Co.* 168 Fed. 105; *Kreigh v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; *De Valle Da Costa v. Southern P. Co.* 160 Fed. 217; *Louisville & N. R. Co. v. Fisher*, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68; *Clark v. Southern P. Co.* 175 Fed. 123; *Philadelphia & B. Face Brick Co. v. Warford*, 123 Fed. 843; *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 319; *Clark v. Southern P. Co.* 175 Fed. 122; *Turk v. Illinois C. R. Co.* 193 Fed. 254, and cases cited; *Stone v. Chicago, B. & Q. R. Co.* 195 Fed. 835; *Sagara v. Chicago, R. I. & P. R. Co.* 189 Fed. 220; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 201 Fed. 935; *Moyer v. Chicago, M. & St. P. R. Co.* 168 Fed. 105; *Puget Sound Sheet Metal Works v. Great Northern R. Co.* 195 Fed. 350; *Baldwin v. Pacific Power & Light Co.* 199 Fed. 291; *George v. Tennessee*

Coal, Iron & R. Co. 184 Fed. 951. But when a plea to the jurisdiction of the Federal court is seasonably made under the conditions as above stated, it should be sustained and the case remanded. Macon Grocery Co. v. Atlantic Coast Line R. Co. 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; Hubbard v. Chicago, M. & St. P. R. Co. 176 Fed. 997; Shawnee Nat. Bank v. Missouri, K. & T. R. Co. 175 Fed. 456; Bottoms v. St. Louis & S. F. R. Co. 179 Fed. 319; Lawrence v. Southern Pacific Co. 180 Fed. 827. The rule, then, seems now to be established that while a suit by a citizen of one State against a citizen of another State, brought in a third State, would be fatal to its removal, if seasonably objected to, yet if the suit is otherwise within Federal jurisdiction, and is removed, and both parties recognize the jurisdiction of the Federal court by proceeding with the case therein, then the court may adjudicate the case.

Removal Must be Made to the "Proper District."

Section 28, chap. 3, of the Judicial Code, (Comp. Stat. 1913, sec. 1010), provides that removals from State courts must be to the "*proper Federal district*" by the defendant or defendants being nonresidents.

Section 51, chap. 4, of the Judicial Code, (Comp. Stat. 1913, sec. 1033), provides that no suit can be brought in any district court of the United States against any person in any other district than that of which he is an inhabitant, except that when jurisdiction is based on diversity of citizenship it may be brought in plaintiff's district, or defendant's residence district. In *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, it was held that section 28 was an absolute limitation to any removal from a State court to any United States district court other than the Federal district in which the suit could be brought originally. This case, however, was subsequently modified in *Re Moore*, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164, and in *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720, deciding that where a suit was brought in a State court in a State of which neither party was an inhabitant, that the defendant
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could remove the case to the United States district court in the Federal district in which the suit was brought with the consent of plaintiff, expressed or implied from acts. In *Stewart v. Cybur Lumber Co.* 211 Fed. 343, it is held that the "proper district" is the district of defendant's residence, if the suit could have been originally brought there under sec. 24, Judicial Code, (Comp. Stat. 1913, sec. 991); *Mattison v. Boston & M. R. Co.* 205 Fed. 821; *Gruetter v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 249; *Smellie v. Southern P. R. Co.* 197 Fed. 642; *Turk v. Illinois C. R. Co.* 193 Fed. 252; *Rubber & C. Harness Trimming Co. v. John L. Whiting-J. J. Adams Co.* 210 Fed. 393; *St. John v. United States Fidelity & G. Co.* 213 Fed. 685; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994. In *Mattison v. Boston & M. R. Co.* and *Stewart v. Cybur Lumber Co.* supra, it is intimated that where the parties to the suit were citizens of other States than where the suit was brought, that defendant could remove the suit to the Federal district of the State of which he was an inhabitant; that defendant cannot be deprived of his right to remove, because plaintiff sued in a State of which neither party was an inhabitant. But in *St. John v. United States Fidelity & G. Co.* 213 Fed. 687, it is held that sec. 29, construed with sec. 28, confines removals to the Federal district in which the suit was pending, and not to other Federal districts in or out of the State. *St. John v. Taintor*, 220 Fed. 457.

In conclusion it may be stated that the "proper district" in cases where jurisdiction depends on diversity of citizenship is either the districts of plaintiff's residence and citizenship or defendant's district; and where jurisdiction depends on a Federal question the "proper district" is defendant's residence district. *Cincinnati, H. & D. R. Co. v. Orr*, 215 Fed. 261; *Mutual L. Ins. Co. v. Painter*, 220 Fed. 998; see *Louisville & N. R. Co. v. Western U. Teleg. Co.* 218 Fed. 91, criticized in *Mutual L. Ins. Co. v. Painter*, supra. Where a cause is removed, and it appears from the record that the parties are not citizens of the State in which the suit is brought, the Federal court will allow the petition for removal to be amended to show that the plaintiff was in fact a citizen of the district of suit. *Harding v. Standard Oil Co.* 170 Fed. 651.

But there is a class of cases which, by reason of the procedure

necessary to prosecute them, cannot be brought originally in the Federal court, yet may be removed. As in condemnation suits. *Colorado Midland R. Co. v. Jones*, 29 Fed. 193; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 210; *Searl v. School Dist. No. 2*, 124 U. S. 199, 31 L. ed. 416, 8 Sup. Ct. Rep. 460; *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 790, 791; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578; *Broadmoor Land Co. v. Curr*, 73 C. C. A. 537, 142 Fed. 421; *Kirby v. Chicago & N. W. R. Co.* 106 Fed. 552; *West Virginia v. King*, 112 Fed. 369; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 213, 214; *Wilson v. Smith*, 66 Fed. 81; *Re Jarnecke Ditch*, 69 Fed. 163.

Thus a suit under a statute of a State to collect taxes may require such procedure as would prevent an original action in the Federal court, yet the controversy may present every element necessary under the first section of the act of 1888; in such case the suit can be removed to the Federal court. *Re Stutsman County*, 88 Fed. 337; *Re Jarnecke Ditch*, 69 Fed. 163; *Waha Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 141; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209.

The conferring of exclusive jurisdiction by States on its own courts by prescribing exclusive methods cannot affect the right of removal if it be a suit of a civil nature cognizable in law or equity. *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 949, and cases cited; *Morrill v. American Reserve Bond Co.* 151 Fed. 306.

CHAPTER CXXIII.

AMENDING PETITION FOR REMOVAL.

The rule is, a petition for removal cannot be amended if the jurisdiction is not stated, but can if imperfectly stated. *Santa Clara County v. Goldy Mach. Co.* 159 Fed. 751; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240-245, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Shane v. Butte Electric R. Co.* 150 Fed. 801-814; *Fife v. Whittell*, 102 Fed. 537; *Healy v. McCormick*, 157 Fed. 318; *Wallenburg v. Missouri P. R. Co.* 159 Fed. 217; *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 729; *Dinet v. Delavan*, 117 Fed. 978; *Dalton v. Milwaukee Mechanics' Ins. Co.* 118 Fed. 877; *Dalton v. Germania Ins. Co.* 118 Fed. 936; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 814; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 363; *Ostrander v. Blandin*, 211 Fed. 733; *Vestal v. Ducktown Sulphur, Copper & I. Co.* 210 Fed. 375.

Thus, allegations as citizenship have been permitted to be amended when defectively stated (*Thompson v. Stalman*, 131 Fed. 809; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Kinney v. Columbia Sav. & L. Asso.* 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30; *Muller v. Chicago, I. & L. R. Co.* 149 Fed. 939, 940; *Flynn v. Fidelity & C. Co.* 145 Fed. 265; *Hodge v. Chicago & A. R. Co.* 57 C. C. A. 388, 121 Fed. 48; *Kerr v. Modern Woodmen*, 54 C. C. A. 655, 117 Fed. 595; *Kyle v. Chicago, R. I. & P. R. Co.* 173 Fed. 238; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 14; *De La Montanya v. De La Montanya*, 158 Fed. 117; *Wilbur v. Red Jacket Consol. Coal & Coke Co.* 153 Fed. 662; *Crehore v. Ohio & M. R. Co.* 131 U. S. 245, 33 L. ed. 145, 9 Sup. Ct. Rep. 692; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616; *Tremper v. Schwabacher*, 84 Fed. 414; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; *Stadleman v. White Line Towing Co.* 92 Fed. 209; *Hadfield v. Northwestern Life Assur.*

Co. 105 Fed. 530); and it seems under certain conditions the State court may permit an amendment. *Roberts v. Pacific & A. R. & Nav. Co.* 104 Fed. 577.

With the exceptions above stated, you must stand on your case as made, showing jurisdiction. *Ibid.*; *Fife v. Whittell*, 102 Fed. 537; *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*), 151 U. S. 676, 38 L. ed. 312, 14 Sup. Ct. Rep. 533; *Coples v. Texas & P. R. Co.* 67 Fed. 9; *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 729, and cases cited; *Waite v. Phoenix Ins. Co.* 62 Fed. 769; *Carson v. Dunham*, 121 U. S. 430, 30 L. ed. 995, 7 Sup. Ct. Rep. 1030; *Stevens v. Nichols*, 130 U. S. 231, 32 L. ed. 915, 9 Sup. Ct. Rep. 518 (see authorities under "Petition cannot be Amended.")

But whatever the rule may be, if the circuit court of the United States permits the amendment, it will not be reversed on appeal. *Ayres v. Watson*, 137 U. S. 584, 34 L. ed. 803, 11 Sup. Ct. Rep. 201. —

CHAPTER CXXIV.

SERVICE OF PROCESS IN A STATE COURT AFFECTING REMOVAL.

We have seen that when a case is removed it retains the same status as to all process and proceedings that have been taken in the State court. Secs. 4 and 6, act of 1875. I will now speak of how far the service or nonservice of process in the State court will bind the Federal court in removing a cause, or after its removal. New Code, sec. 38, (Comp. Stat. 1913, sec. 1020.)

In discussing who may remove a cause when the right of removal depends on diversity of citizenship, it was stated as a rule that where the cause of action was joint and the suit brought against a resident and nonresident defendant, the fact that the resident was not served at the time the application for removal should be made did not give the nonresident the right of removal. *Patchin v. Hunter*, 38 Fed. 51; *Putnam v. Ingraham*, 114 U. S. 57, 29 L. ed. 65, 5 Sup. Ct. Rep. 746; *Brooks v. Clark*, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; *Lederer v. Sire*, 105 Fed. 529.

The nonservice of the resident defendant cannot change the character of the suit, *ibid.* and the U. S. Rev. Stat. sec. 737, authorizing the court to proceed to the trial of the suit between the parties properly before the court, does not apply to removals. *Ames v. Chicago, S. F. & C. R. Co.* 39 Fed. 881. See *Whitcomb v. Smithson*, 175 U. S. 637, 638, 44 L. ed. 305, 20 Sup. Ct. Rep. 248.

However, if the cause of action be joint, and both parties sued, but the resident not served is dismissed from the suit, or if both resident and nonresident be served and the resident be dismissed, then the nonresident defendant may remove the cause to the Federal court as soon as the resident is dismissed, though the time for removal has elapsed; but as long as the plaintiff seeks to recover against both the resident and nonresident, and for that purpose holds them in the case, the fact that he has not served the resident would not give the nonresident the right of removal. *Powers v. Chesapeake & O. R. Co.*

169 U. S. 92-102, 42 L. ed. 673-677, 18 Sup. Ct. Rep. 264; *Doremus v. Root*, 94 Fed. 762; *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 69, 47 L. ed. 78, 23 Sup. Ct. Rep. 24.

In *Tremper v. Schwabacher*, 84 Fed. 413, another rule is indicated, which is as follows: Where by a State statute a suit is brought against several parties, residents and nonresidents, the nature of whose interest in the subject-matter is one of copartnership, and a joint judgment against all can be recovered on a service on one of them, thereby subjecting their joint interest to execution under such judgment, then, where the service is made on the nonresident only, he may remove. See, also, *Diday v. New York, P. & O. R. Co.* 107 Fed. 569. If, however, both resident and nonresident be served, and joint as well as individual judgments be sought, then the nonresident cannot remove. See "Partners as Parties."

Another rule to which your attention is called is as follows: If the plaintiff sues on a joint and several liability a resident and nonresident defendant, and serves only the nonresident, and proceeds against him, this is an election to sever, and gives the nonresident the right to remove as soon as the purpose is evident that he alone is to be sued. *Berry v. St. Louis & S. F. R. Co.* 118 Fed. 911-915; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. See *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896.

Another rule to be deduced from the authorities is that the fact that resident parties to the suit are merely formal parties, or not sufficiently identified in interest as to be materially affected by a judgment, or joined under some pretense without any real interest, then whether they be served or not with process will not affect the right of a nonresident defendant or defendants joining in the application from removing the cause to the Federal court. *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 696; *Nelson v. Hennessey*, 33 Fed. 113; *May v. St. John*, 38 Fed. 770; *Parkinson v. Barr*, 105 Fed. 81; *Loop v. Winters*, 115 Fed. 362-366; *Henderson v. Cabell*, 43 Fed. 258; *Wood v. Davis*, 18 How. 467, 15 L. ed. 460. (See "Nominal Parties.")

Again, where a suit is brought against a resident and nonresident, if the interest of the resident defendant is identical

with that of the plaintiff, the nonresident defendant may remove, though the resident be served or not with process. *Brown v. Murray, N. & Co.* 43 Fed. 614; *Hutton v. Bancroft & S. Co.* 77 Fed. 481.

Second. Removal does not waive the question as to the proper service of process in the State courts.

The special appearance of the defendant to petition for removal is not such an appearance as will waive objection to service after removal. *Lathrop-Shea & H. Co. v. Interior Constr. & Improv. Co.* 150 Fed. 666-670, and cases cited; *Cady v. Associated Colonies*, 119 Fed. 420; *Remington v. Central Pacific R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; *Davis v. Cleveland C. C. & St. L. R. Co.* 146 Fed. 403; *Goepfert v. Compagnie Generale Transatlantique*, 156 Fed. 199, 200; *Louden Machinery Co. v. American Malleable Iron Co.* 127 Fed. 1008; *West v. Cincinnati, N. O. & T. P. R. Co.* 170 Fed. 349; *Conley v. Mathieson Alkali Works*, 110 Fed. 730, s. c. 190 U. S. 411, 47 L. ed. 1115, 23 Sup. Ct. Rep. 728; *Stowe v. Santa Fe Pacific R. Co.* 117 Fed. 368; *Collins v. American Spirit Mfg. Co.* 96 Fed. 133; *Mecke v. Valley Town Mineral Co.* 89 Fed. 114; *Calderhead v. Downing*, 103 Fed. 30. But in *New York Constr. Co. v. Simon*, 53 Fed. 1, it was declared that it was the settled rule of the sixth circuit that a removing defendant could not object to service unless the objection was raised in the State court. *Bentlif v. London & C. Finance Corp.* 44 Fed. 667, disapproved.

If the State court did not rightly acquire jurisdiction, it may be raised in the Federal court. (See authorities above.) *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 903; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brow*, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126; *Cady v. Associated Colonies*, 119 Fed. 423; *Peterson v. Morris*, 98 Fed. 49; *Auracher v. Omaha & St. L. R. Co.* 102 Fed. 1; *Case v. Smith, L. & Co.* 152 Fed. 730.

It seems that if the State court has overruled the motion to set aside service, the Federal court will not rehear it, that is where the service in the State court is valid the Federal court should not set it aside, even though it may have been,

had the suit been originally brought in the Federal court. *Sleicher v. Pullman Co.* 170 Fed. 365, 366; *Allmark v. Platte S. S. Co.* 76 Fed. 615. But when a motion is made in a State court and not acted on, it may be heard in the Federal court (*Kauffman v. Kennedy*, 25 Fed. 785); and where service is by publication, objection that the State court was without jurisdiction for want of a *res* to support it may be made. *Ahlhauser v. Butler*, 50 Fed. 705; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582.

The rule may be stated that the authority to determine whether the state court had jurisdiction is not limited by state laws. *Cady v. Associated Colonies*, 119 Fed. 423, 424, and cases cited; *Case v. Smith, L. & Co.* 152 Fed. 730; *Goldey v. Morning News*, 156 U. S. 523, 39 L. ed. 519, 15 Sup. Ct. Rep. 559.

Where the service was by publication on the foreclosure of a mortgage, the Federal court will not set aside the service so far as the foreclosure is concerned, but will not give a personal judgment on the service. *Du Pont v. Abel*, 81 Fed. 534.

Where service is by attachment in State court without personal service, it is no ground to remand. *Purdy v. Wallace Müller & Co.* 81 Fed. 513; *Lebensberger v. Scofield*, 71 C. C. A. 476, 139 Fed. 380; *Long v. Long*, 73 Fed. 369; *Vermilya v. Brown*, 65 Fed. 149; *Richmond v. Brookings*, 48 Fed. 241. See *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43. (See chapter 117, "Status after Removal.")

Amending Service After Removal.

Whatever may be the defects of service, a state officer cannot amend after removal. *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156; *Hawkins v. Peirce*, 79 Fed. 452. Nor has the Federal court after removal any power to issue process to perfect the service of the State court. *Stowe v. Santa Fe P. R. Co.* 117 Fed. 368. Therefore the Federal court must, in the absence of proper service, dismiss the case, because if the State court had no jurisdiction it cannot take any. *Ibid.* But thus dismissing the case will not prevent the State court from again taking jurisdiction on the same cause of action. *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183, 184, and cases cited.

CHAPTER CXXV.

REMOVAL ON GROUND OF LOCAL PREJUDICE.

Who May Remove.

I have already referred to the statute permitting the removals from State courts by *any* defendant being a nonresident, at *any time before* the trial in the State court, when it shall be made to appear to the United States circuit court that from prejudice or local influence, such defendant will not be able to obtain justice in the State court in which the suit is pending or in any other State court to which the said defendant may, under the laws of the State, remove the same, provided, the amount in controversy be over three thousand dollars. *Water Comrs. v. Robbins*, 125 Fed. 656; *Cochran v. Montgomery County*, 199 U. S. 271, 50 L. ed. 187, 26 Sup. Ct. Rep. 58, 4 Ann. Cas. 451; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; *Malone v. Richmond & D. R. Co.* 35 Fed. 625; *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207; new Code, secs. 28, 29 (Comp. Stat. 1913, secs. 1010, 1011); *Armstrong v. Kansas City Southern R. Co.* 192 Fed. 616.

There has been much controversy over the fact as to whether, under the language of the act, a nonresident defendant could remove unless there was a separable controversy; but, whatever may have been the rule under U. S. Rev. Stat. sec. 639, see *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207, yet the recognized rule under the act of 1888 permits *any* nonresident defendant, though joined with resident citizen, to remove the case, if prejudice or local influence exists. *Holmes v. Southern R. Co.* 125 Fed. 301; *Whelan v. New York L. E. & W. R. Co.* 1 L.R.A. 65, 35 Fed. 849; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 665, and cases cited; *Montgomery County v. Cochran*, 116 Fed. 994; *Bart-*

lett v. Gates, 117 Fed. 362; Seaboard Air Line R. Co. v. North Carolina R. Co. 123 Fed. 629; Jackson & S. Co. v. Pearson, 60 Fed. 113; Haire v. Rome R. Co. 57 Fed. 321; Fisk v. Henarie, 32 Fed. 417.

The weight of authority is certainly in favor of the text, as far as numbers go, at least, but the cases upholding this rule rest upon the fact that sec. 1 of the act of 1888, sec. 28, Code (Comp. Stat. 1913, sec. 1010), allowing a removal for existing prejudice, or local influence is a distinct, or rather independent, ground for removal. It will be seen, however, that the case of Cochran v. Montgomery County, cited above, was appealed to the Supreme Court of the United States, in which a citizen of Alabama had sued a citizen of Alabama and a citizen of Maryland in the State court of Alabama, which was removed to the Federal court in Alabama upon the petition of the Maryland defendant, setting up prejudice and local influence. The case was reversed and remanded to the State court because improperly removed, the court stating that the 4th clause of section 2 of the act of 1875 amended by the act of 1888 does not furnish a separate and independent ground of Federal jurisdiction, but only a special condition to be applied in the preceding clauses; that is, the local prejudice clause does not describe a new class of suits that may be removed from the State courts, but a ground for removing a class of suits previously defined. Therefore the Chief Justice concludes that the construction given by the various cases, above cited, to the local prejudice clause, to wit, that the words "any defendant being such citizen of another State may remove" implied that there might be defendants who were not citizens of another State, and yet the cause be removable was erroneous, and in the light of the preceding section of the removal act, requiring the controversy to be removed, to be between a citizen or citizens of one State and a citizen or citizens of another or other States, did not include cases where the controversy was partly between citizens of the same State, and consequently the local prejudice clause could not apply to the latter condition. Again, it is assumed that to reach a different conclusion would conflict with the rule that a cause is only removable when it may have been originally brought in the Federal court. This case was followed in *Cleveland v.*

Cleveland, C. C. & St. L. R. Co. 77 C. C. A. 467, 147 Fed. 173, and in Southern R. Co. v. Thomason, 77 C. C. A. 170, 146 Fed. 974. So the rule seems to be established that to remove on the ground of local prejudice, etc., it must be a suit in which there is a controversy between citizens of different States, as required under the rule of jurisdiction by diversity of citizenship. *Terre Haute v. Evansville & T. H. R. Co.* 106 Fed. 549; *Campbell v. Milliken*, 119 Fed. 982; *Rosenthal v. Coates*, 148 U. S. 146, 37 L. ed. 400, 13 Sup. Ct. Rep. 576; *Armstrong v. Kansas City Southern R. Co.* 192 Fed. 614, and cases cited.

Must Defendants All Join in Petition.

The act says, "any defendant being a citizen of another State may remove," and it is said in *Cochran v. Montgomery County*, 199 U. S. 273, 50 L. ed. 188, 26 Sup. Ct. Rep. 58, 4 Ann. Cas. 451, that these words were inserted in order that a defendant entitled to remove may not be cut off from the right by a refusal of codefendants to join in the application. *Holmes v. Southern R. Co.* 125 Fed. 302, 303; *Bonner v. Meikle*, 77 Fed. 485. One defendant cannot remove because of local prejudice as between him and another defendant. *Hanrick v. Hanrick*, 153 U. S. 198, 38 L. ed. 687, 14 Sup. Ct. Rep. 835.

Petition for Removal.

The petition must be sworn to and presented to the Federal court before the trial of the cause in the State court, and when removed the plaintiff must join issue in the Federal court, where alone the facts can be tried. Act of 1888, sec. 1; *Bonner v. Meikle*, 77 Fed. 485; *Hanrick v. Hanrick*, 153 U. S. 197, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225; *Hobart v. Illinois C. R. Co.* 81 Fed. 5; *Kaitel v. Wylie*, 38 Fed. 865; *Farmers' & M. Nat. Bank v. Schuster*, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. See *Montgomery County v. Cochran*, 116 Fed. 986, for form of petition. Also *Weldon v. Fritzlen*, 128 Fed. 609, 610.

What to State.

It is not sufficient to state that one has reason to believe that from prejudice, etc., he will be unable to obtain justice. The existence of prejudice must be alleged as a matter of fact. *Collins v. Campbell*, 62 Fed. 850. (See Affidavit, below.)

Where Application Made and When.

We see the application must be made to the Federal court, and can be made "at any time before the trial" in the State court of the case on its merits. *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207; *Hobart v. Illinois C. R. Co.* 81 Fed. 5, but see *Whelan v. New York, L. E. & W. R. Co.* 1 L.R.A. 65, 35 Fed. 849, holding not too late after demurrer heard in the State court, but not after trial in the State court, though a mistrial. *Farmers' & M. Nat. Bank v. Schuster*, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; *Rosenthal v. Coates*, 148 U. S. 143, 37 L. ed. 399, 13 Sup. Ct. Rep. 576.

The Affidavit.

The affidavit for removal should set forth the facts and circumstances so as to satisfy the court, if true, of the existence of prejudice or adverse local influence. *Amy v. Manning*, 38 Fed. 868; *Re Pennsylvania Co.* 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 154.

It should not rest upon mere belief or opinion, but be direct in its allegations. *Franz v. Wahl*, 81 Fed. 9; *Short v. Chicago, M. & St. P. R. Co.* 33 Fed. 114; *Schwenk v. Strang*, 8 C. C. A. 92, 19 U. S. App. 300, 59 Fed. 209; *Crotts v. Southern R. Co.* 90 Fed. 2; *Curnow v. Phoenix Ins. Co.* 44 Fed. 305; *Hall v. Chattanooga Agri. Works*, 48 Fed. 602.

In *Collins v. Campbell*, 62 Fed. 851, and *Crotts v. Southern R. Co.* 90 Fed. 2, it is said that the petition and affidavit need not set out the facts upon which the belief in the existence of the prejudice is founded, but the existence of the prejudice must be alleged as a fact.

The affidavit may be filed in the State court, and a certified

copy in the Federal court. *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225. See *Crotts v. Southern R. Co.* 90 Fed. 1; *Montgomery County v. Cochran*, 116 Fed. 987, 988, for form of affidavit.

See affidavit held insufficient. *Dennison v. Brown*, 38 Fed. 535; *Hakes v. Burns*, 40 Fed. 33; *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225; *Turnbull Wagon Co. v. Linthicum Carriage Co.* 80 Fed. 4; *Collins v. Campbell*, 62 Fed. 850. See sec. 28, new Code, chap. 3 (Comp. Stat. 1913, sec. 1010).

Notice.

Reasonable notice of the application to the Federal court ought to be given to the adverse party, so that an opportunity to contest the application in the Federal court may be had. *Schwenk v. Strang*, 8 C. C. A. 92, 19 U. S. App. 300, 59 Fed. 209-211; *Carson & R. Lumber Co. v. Holtzclaw*, 39 Fed. 578; *Malone v. Richmond & D. R. Co.* 35 Fed. 625. See *Crotts v. Southern R. Co.* 90 Fed. 1; and authorities cited, where it is held that the removal may be granted on an *ex parte* hearing (*Montgomery County v. Cochran*, 116 Fed. 985), but when so granted plaintiff may thereafter contest the allegations of the petition (*Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805); but, giving notice of the application is the better practice. *Herndon v. Southern R. Co.* 73 Fed. 307; *Bonner v. Meikle*, 77 Fed. 485; *Reeves v. Corning*, 51 Fed. 774. But when obtained without notice the court will permit the plaintiff to contest the allegations, and will give a reasonable time to do so. *Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805.

How Issue Tried.

The judiciary act of 1888, section 1, provides that the circuit court shall examine into the truth of the affidavit and the grounds thereof on application of the plaintiff. The issue may be tried in such manner as the court may direct; that is, by affidavits, depositions, or by oral evidence. *Short v. Chicago, M. & St. P. R. Co.* 33 Fed. 117; *Re Pennsylvania Co.* 137 U. S. 456, 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 141;

Carpenter v. Chicago, M. & St. P. R. Co. 47 Fed. 535; Carson v. Dunham, 121 U. S. 425, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030; Carlisle v. Sunset Teleph. & Teleg. Co. 116 Fed. 896. (See Nature of Proof, below.)

Nature of Proof.

The amount and manner of proof required must be left to the discretion of the court (Crotts v. Southern R. Co. 90 Fed. 1; Tacoma v. Wright, 84 Fed. 836; Smith v. Crosby Lumber Co. 46 Fed. 819; Parker v. Vanderbilt, 136 Fed. 250; Montgomery County v. Cochran, 116 Fed. 985; Amy v. Manning, 38 Fed. 868; Maher v. Tower Hotel Co. 94 Fed. 225; Detroit v. Detroit City R. Co. 54 Fed. 2; Southworth v. Reid, 36 Fed. 451; Bellaire v. Baltimore & O. R. Co. 146 U. S. 118, 36 L. ed. 911, 13 Sup. Ct. Rep. 16), but the inability to obtain justice because of prejudice or local influence in the State court in which the suit is brought, as well as in any State court to which under the laws of the State the case could be removed, must appear to the legal satisfaction of the court (ibid.; Fisk v. Henarie, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207), as to changing venue in case of local prejudice.

As to what is sufficient to create legal satisfaction will be found discussed in Re Pennsylvania Co. 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 141, and it need not be shown that the prejudice or influence primarily exists against the party seeking removal, but it may be a prejudice in favor of his adversary (Neale v. Foster, 31 Fed. 55; Parks v. Southern R. Co. 90 Fed. 4; Bartlett v. Gates, 117 Fed. 362), and to which the judge is exposed. Montgomery County v. Cochran, 116 Fed. 985, is a case where the facts were held sufficient. Detroit v. Detroit City R. Co. 54 Fed. 18.

Order of Removal.

The circuit court issues its order to the clerk of the State court in which the cause is pending, and requires him to certify to the United States circuit court a transcript of the proceedings in the cause (see 90 Fed. 2-4, for forms or order); and while the law does not require it, proper respect for State

courts demands that the certified copy of the order of removal be filed in the State court. *Bartlett v. Gates*, 117 Fed. 362.

Motion to Remand.

The plaintiff may contest in the Federal court the grounds of the petition for removal to prevent it, if seasonably notified of the application, or he may after removal, upon motion to remand, contest the allegations of the petition for removal. *Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805; *Montgomery County v. Cochran*, 116 Fed. 985. As to form of motion to remand, see 116 Fed. 988.

The suit may be divided and remanded in part. *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. By clause 4 of section 2 of the act of 1875, as amended by the act of 1888, it is provided that if it further appear that said suit can be fully determined as to other defendants in a State court, unaffected by prejudice, and no party to the suit will be prejudiced by a separation of the parties, said court may direct the suit to be remanded as to such parties. *Holmes v. Southern R. Co.* 125 Fed. 303.

Burden of Proof.

We thus see what issue can be made in a motion to remand the cause to the State court, and where the allegations of the petition by which the case has been removed have thus been put in issue, the burden is on the defendant to establish the jurisdiction he seeks. *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

Remedy When Remand Refused.

If the remand for any cause is refused, file your bill of exceptions as follows:

Title as in cause.

In the United States District Court
....., A.
D. 19...

Bill of Exceptions.

Be it remembered that on this day came on to be heard the plaintiff's mo-

tion to remand the above entitled and numbered cause to the State court from whence it was removed, and the court having heard the motion and argument of counsel thereon, and having considered the same, said motion was by said court in all things overruled and held for naught, to which ruling of the court plaintiff excepted, and here tenders his bill of exceptions asking that the same be approved and made a part of the record, which is accordingly done.

The object is to reserve the point in case the cause is appealed. There is no appeal from an order to remand (*German Nat. Bank v. Speckert*, 181 U. S. 407-409, 45 L. ed. 926, 927, 21 Sup. Ct. Rep. 688; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; sec. 2, act 1875, amended by act 1888, clause 6); but where jurisdiction is retained by overruling the motion to remand, it may be revised by the appellate court. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 557-582, 40 L. ed. 536-543, 16 Sup. Ct. Rep. 389. See *Harding v. Corn Products Mfg. Co.* 117 C. C. A. 332, 198 Fed. 628.

Mandamus as Remedy When Remand Refused.

That mandamus lies to correct an abuse of judicial discretion, as in retaining jurisdiction of a removed case when in fact the United States district court had no jurisdiction of the case, because not one that may have been originally brought in the court to which it had been removed, was decided in *Re Dunn*, 212 U. S. 375, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150. But in *Ex parte Harding*, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324, these decisions were disapproved and greatly qualified as to the use of mandamus to control the discretion of the court refusing to remand a removed case, as the writ cannot be used as an appeal or perform the office of a writ of error. *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176; *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; *Ex parte Greutter*, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690. The conclusion is reached
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that only in most exceptional cases, as where the court refusing to remand had no jurisdiction whatever over the case, that mandamus would lie, as in *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, and in *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *Sagara v. Chicago, R. I. & P. R. Co.* 189 Fed. 223; *Re Tobin*, 214 U. S. 506, 53 L. ed. 1061, 29 Sup. Ct. Rep. 702.

Effect of Order Remanding.

The order is conclusive on the State court. *Western U. Teleg. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 557, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Pioneer Sav. & L. Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 168.

CHAPTER CXXVI.

REMOVAL BY RECEIVERS.

I will briefly refer to removals by Federal receivers when sued in a State court, only to suggest when motions to remand may be made.

By section 3 of the act of 1888, amending the act of 1887, 25 Stat. at L. 436, chap. 866 (Comp. Stat. 1913, sec. 1048), a Federal receiver can be sued in a State court in respect of any act or transaction of his in carrying on the business connected with the property of which he is a receiver, without the previous leave of the court appointing him.

As to the right of Federal receivers to remove a case brought in the State court under this act, there has been conflict in the cases, but I think the questions are now settled with reasonable definiteness.

In *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171, the direct questions arose in an effort by a Federal receiver to remove a case from the State court on the sole ground that he was sued as a Federal receiver. S. C. 41 C. C. A. 160, 101 Fed. 5; *Rural Home Teleph. Co. v. Powers*, 176 Fed. 986.

The court, construing the act above referred to, says: "This act gave the citizen the right to determine in his local court by verdict of a jury the amount and justness of his cause of action, and the manifest object rejects the construction of many of the circuit courts that the act of 1888 did not change the law further than to relieve one from contempt for suing the receiver in the State court." *Pepper v. Rogers*, 128 Fed. 988; *Chesapeake, O. & S. W. R. Co. v. Smith*, 101 Ky. 707, 42 S. W. 538; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. 523.

To permit such a construction eliminated the very spirit, if not the letter, of the act, for if it could be removed to the Fed-

eral court simply because the receiver was appointed by a Federal court, wherein was the benefit to the citizen to sue in his local court?

The privilege in no way interferes with the receiver's custody of the property, for this is abundantly protected by the latter clause of section 3 of the act against such interference. *Ibid.*; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 338, 45 L. ed. 222, 21 Sup. Ct. Rep. 171; *Marrs v. Felton*, 102 Fed. 778.

This case reasonably settles the question that the right to sue a Federal receiver in a State court to establish a claim *growing out of any act or transaction* of such receivers in carrying on the business is a substantial right and presents no Federal question, nor a case arising under the Constitution and laws of the United States simply by reason of the fact that the defendant was a Federal receiver. Consequently, a case removed on this ground can be remanded on motion.

In *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500, the court held that the order of a Federal court appointing a receiver was not equivalent to a law of the United States in the meaning of the Constitution. *Bausman v. Dixon*, 173 U. S. 114, 43 L. ed. 634, 19 Sup. Ct. Rep. 316.

Of course, if the suit in the State court against the Federal receiver substantially involves a controversy dependent on the construction of the Constitution, laws, or treaties of the United States, and which appears in the case as stated by the plaintiff, or on any other ground of Federal jurisdiction appearing, then receivers, like any other citizen, may remove the case from the State to the Federal courts. *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 341, 342, 45 L. ed. 223, 224, 21 Sup. Ct. Rep. 171.

What has thus been said about the right of removal by Federal receivers does not apply to receivers of corporations created by Congress. Such corporations are exceptions to the rules applicable to the jurisdiction of the Federal courts, and the bare statement in the petition for removal that the applicant is a receiver of a Federal corporation, would be sufficient to support the removal of the cause. I have, however, sufficiently discussed this anomaly.

National Banks.

National banks, though created by Congress, are excluded from this privilege attached to a national charter. By act of 1882, 22 Stat. at L. 162, chap. 290 (Comp. Stat. 1913, sec. 9665), they are put upon the same plane with banks not organized under the laws of the United States.

In *Leather Mfg. Nat. Bank v. Cooper*, 120 U. S. 779, 30 L. ed. 817, 7 Sup. Ct. Rep. 777, this act was construed, and it was held that removals by these banks from the State to the Federal courts were prohibited unless some ground of Federal jurisdiction existed other than their creation by Congress. *Wichita Nat. Bank v. Smith*, 19 C. C. A. 42, 36 U. S. App. 530, 72 Fed. 568; *Burnham v. First Nat. Bank*, 3 C. C. A. 486, 10 U. S. App. 485, 53 Fed. 163.

By section 4 of the act of 1888, 25 Stat. at L. 436, chap. 866, all banking associations for the purpose of jurisdiction were to be deemed citizens of the State in which they were located, and Federal jurisdiction was conferred to the grounds upon which other citizens may invoke it, except in cases where the affairs of the bank were being wound up, or in suits by the United States, its officers or agents. *Guarantee Co. v. Hanway*, 44 C. C. A. 312, 104 Fed. 369; *International Trust Co. v. Weeks*, 116 Fed. 898.

Intervention for Removal.

In closing this subject, I shall call your attention to cases removed by interveners, and causes for remanding the same.

The question arises as to whether a party can intervene in a suit and remove it to the Federal court, there being no ground of Federal jurisdiction prior to his intervention.

It is clear that whatever may have been the right of removal by the defendant before one has intervened, if at the time of the intervention the right has been lost by lapse of time, or from any other cause by the defendant, then the intervener who causes himself to be associated with, or substituted for, the defendant cannot remove the case to the Federal court. One coming voluntarily into the action must take the case as he finds it. *Nash v. McNamara*, 145 Fed. 543, and cases cited; *Cable*

v. Ellis, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85; Speckert v. German Nat. Bank, 38 C. C. A. 682, 98 Fed. 154, 155; Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 997; Farmers' & M. Nat. Bank v. Schuster, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; Richmond & D. R. Co. v. Findley, 32 Fed. 642; Olds Wagon Works v. Benedict, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1; McDonnell v. Jordan, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 886.

A substituted party comes in only with the rights of the party whose place he takes. Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455, 4 Sup. Ct. Rep. 472. So a party who purchases property *pendente lite* comes in subject to the disabilities of the original parties so far as removal is concerned. Jefferson v. Driver, 117 U. S. 272, 29 L. ed. 897, 6 Sup. Ct. Rep. 729. So an intervener who introduces himself into an action to protect himself as against an indemnity to the defendant cannot remove it if the defendant cannot; or if he holds in privity with defendant. *Ibid.*; Olds Wagon Works v. Benedict, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1-4; Goodnow v. Dolliver, 26 Fed. 470; Weller v. J. B. Pace Tobacco Co. 32 Fed. 860; Concord Coal Co. v. Haley, 76 Fed. 882; Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727. So parties brought into a suit by cross bill in a State court, who have succeeded to the interests of plaintiff, cannot remove as defendants. Nash v. McNamara, 145 Fed. 541. So where one intervenes in a suit claiming the proceeds of a check sued upon cannot remove the case if the right of removal did not exist when he intervened. Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 997-999, and authorities cited; Cable v. Ellis, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85.

In Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 998, it is said the statute makes no provision for a removal by anyone except the "defendant or defendants therein." It makes no provision at the instance of persons who may be pecuniarily interested to intervene and remove the cause to the Federal court. Nor does it make any provision for compelling or allowing other parties to be influenced or substituted as defendants, and thereby make a removable cause out of one which was previously not removable

If the State court refuses intervention, the Federal courts are bound by it, and an intervener cannot remove to test his right to intervene. *Kidder v. Northwestern Mut. L. Ins. Co.* 117 Fed. 998, 999. *The Snow v. Texas Trunk R. Co.* 16 Fed. 1, and *American Nat. Bank v. National Ben. & Casualty Co.* 70 Fed. 420, are noted, but declared erroneous.

Where a petition has not been granted they are not parties, and cannot remove. As to the effect of the refusal of an application to intervene, see *Credits Commutation Co. v. United States*, 177 U. S. 314, 315, 44 L. ed. 784, 785, 20 Sup. Ct. Rep. 636; *Land Title & T. Co. v. Asphalt Co.* 127 Fed. 21; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed. 30. But it seems where the intervener is the substantial party to the contest he may intervene and remove. *Chase v. Beech Creek R. Co.* 144 Fed. 572. A receiver may intervene, where the bank of which he is receiver is being wound up, when the bank is sued, and such receiver may remove the case to the Federal court. *Speckart v. German Nat. Bank*, 85 Fed. 12.

Interpleader.

When he may remove. *First Nat. Bank v. Bridgeport Trust Co.* 117 Fed. 969.

Cross Suit.

Where cross suit is filed by the defendant, it makes the plaintiff defendant, and he may remove the case to the Federal court at or before the time he is required to plead to the cross claim. *Price v. Ellis*, 129 Fed. 482; *Hagerla v. Mississippi River Power Co.* 202 Fed. 775, and cases cited; *Nash v. McNamara*, 145 Fed. 541.

CHAPTER CXXVII.

MOTION TO REMAND.

By Whom Made.

The motion to remand must be made by the plaintiff in the suit, as the party removing is estopped from making it (*Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; *Long v. Long*, 73 Fed. 372; *Edwards v. Connecticut Mut. L. Ins. Co.* 20 Fed. 452; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 903; *Philadelphia & B. Face Brick Co. v. Warford*, 123 Fed. 843), unless the court *a quo* had no jurisdiction, then he may dismiss (*Tootte v. Coleman*, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41-45; *Swift v. Philadelphia & R. R. Co.* 58 Fed. 858; see *Purdy v. Wallace, Müller & Co.* 81 Fed. 515).

Effect Of.

It is equivalent to a special plea to the jurisdiction (*Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 384, 28 L. ed. 464, 4 Sup. Ct. Rep. 510; *Phillips v. Western Terra Cotta Co.* 174 Fed. 873), and an order refusing it is subject to reconsideration until final judgment (*Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 580, 40 L. ed. 542, 16 Sup. Ct. Rep. 389). In considering the motion the presumption is against the party objecting to the jurisdiction. *Evers v. Watson*, 156 U. S. 531, 39 L. ed. 522, 15 Sup. Ct. Rep. 430.

The petition for removal is a part of the record (*Supreme Lodge, K. P. v. Wilson*, 14 C. C. A. 264, 30 U. S. App. 234; 66 Fed. 785), and the jurisdictional facts set out in the petition are presumed to be true on motion to remand, and unless

evidence is introduced to contradict them, or the record shows the contrary, the remand will be refused. *Durkee v. Illinois C. R. Co.* 81 Fed. 1; *Loop v. Winters*, 115 Fed. 362; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896.

They are not put in issue by a mere motion to remand. *Ibid.*

Time to Be Made.

We have seen that the motion to remand must be made promptly,—especially where the ground of the motion is a failure to remove the case in time, which is not fundamentally jurisdictional; and this is true, where the motion would be made, on any irregularity, which may be waived by acquiescence or delay. *Wyly v. Richmond & D. R. Co.* 63 Fed. 487; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; see *Collins v. Stott*, 76 Fed. 613. Of course, if the objection goes to some fundamental ground of jurisdiction, it would be the duty of the court, under section 5 of the act of 1875, to remand the cause at any time, when it appeared that the suit did not involve a controversy properly within the jurisdiction. *Indiana v. Tolleston Club*, 53 Fed. 18; *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 2; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *International & G. N. R. Co. v. Hoyle*, 79 C. C. A. 128, 149 Fed. 180–182; *Broadway Ins. Co. v. Chicago, G. W. R. Co.* 101 Fed. 510; *American Bridge Co. v. Hunt*, 64 C. C. A. 548, 130 Fed. 302. See sec. 37, chap. 3, new Code, embodying sec. 5, act of 1875 (Comp. Stat. 1913, sec. 1019), effective January 1st, 1912.

In discussing what power the Federal court had between petition to remove and the removal, we spoke of the right to remand within that period, to which you are referred.

What Acts May Waive the Right to Remand.

When the ground for remanding is of such a nature that it may be waived, then any act of the plaintiff after removal, recognizing the jurisdiction of the Federal court, would have

that effect, as entering a general appearance in the Federal court (*Corwin Mfg. Co. v. Henrici Washer Co.* 151 Fed. 938; *Foulk v. Gray*, 120 Fed. 156; *Moyer v. Chicago, M. & St. P. R. Co.* 168 Fed. 105; *Re Moore*, 209 U. S. 490, 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; *Louisville & N. R. Co. v. Fisher*, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68); or delay on motion to remand (*Wyly v. Richmond & D. R. Co.* 63 Fed. 487; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; *Mulcahey v. Lake Erie & W. R. Co.* 69 Fed. 172; *Proctor Coal Co. v. United States Fidelity & G. Co.* 158 Fed. 211). However, not to give the court jurisdiction if it had none. *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 1.

It is held in *Parkinson v. Barr*, 105 Fed. 82-83, that the plaintiff appearing in the Federal court by asking to file an amended complaint did not waive his right to move to remand. See *Frisbie v. Cheapeake & O. R. Co.* 57 Fed. 1; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83.

Again (*Collins v. Stott*, 76 Fed. 613), the plaintiff was allowed to withdraw his pleading and move to remand.

Form of Motion to Remand.

Title as in suit.

In the District Court of the United
States for the.....District of
.....

And now comes the plaintiff and moves the court to remand the above entitled cause to the State court from whence it was removed for trial for the following reasons:

Because some of the defendants herein are residents and citizens of the State of.....and plaintiff is a resident and citizen of the State of....., or a corporation duly incorporated under and by virtue of the laws of, and that there is involved in this suit no separable controversy which is wholly between citizens of another state on the one hand and citizens of the State of.....on the other hand, all of which facts are apparent in the record in this cause.

Wherefore plaintiff says this court has no jurisdiction to try and determine this case and prays that the same may be remanded to.....district court of the State of.....from whence it came.

R. F.,
Solicitor, etc.

See *Parkinson v. Barr*, 105 Fed. 82; *Weldon v. Fritzlen*, 128 Fed. 611; *Carothers v. McKinley, Min. & Smelting Co.* 122 Fed. 305.

Or you may set up that defendant, who removes the cause on the ground that he is a nonresident of the State, is in truth and fact a resident and citizen of the State, and, therefore, the diversity of citizenship, upon which the jurisdiction is claimed, does not exist, but, in fact, the controversy is wholly between citizens of the State. (*Helena Power Transmission Co. v. Spratt*, 146 Fed. 311), or that there was no fraudulent joinder of parties, as alleged. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 751; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286. Or that a party claiming to be an alien is a naturalized citizen of the United States and a citizen of the State of suit where the suit was brought; subsequent change would not affect the jurisdiction. *Harcovic v. Standard Oil Co.* 105 Fed. 785. Or that it is not shown from the claims set up that it arises under the Constitution and laws of the United States, or is dependent for recovery upon a proper construction or application of either, etc. See *New Castle v. Postal Teleg. Cable Co.* 152 Fed. 572; *Mayo v. Dockery*, 108 Fed. 899; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 107, 39 L. ed. 87, 15 Sup. Ct. Rep. 34; *Walker v. Collins*, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

Or that the suit was not one that could have been originally brought in the Federal court. See authorities below. Or that amount was not sufficient. *New Castle v. Western U. Teleg. Co.* 152 Fed. 569-571 and cases cited.

As we have seen, a dismissal as to the removing defendant gives the right to remand. *Youtsey v. Hoffman*, 108 Fed. 699; *Cassidy v. Atlanta & C. Air Line R. Co.* 109 Fed. 673.

If the jurisdiction is doubtful on a motion to remand, it should be remanded. *McKown v. Kansas & T. Coal Co.* 105 Fed. 657; *Kessinger v. Vannatta*, 27 Fed. 890; *Nash v. McNamara*, 145 Fed. 542; *Plant v. Harrison*, 101 Fed. 307; *Ernst v. American Spirits Mfg. Co.* 114 Fed. 981; *Mathews Slate Co. v. Mathews*, 148 Fed. 490. And the duty to remand

should not be affected by the fact that no cause of action it stated; that is a question for the State court. *Broadway Ins. Co. v. Chicago*, G. W. R. Co. 101 Fed. 507. Nor can the consolidation of a suit, with one pending in the Federal court, affect the right to remand. *Colburn v. Hill*, 41 C. C. A. 467, 101 Fed. 500. When a suit is prosecuted in a State court of equity, and, if removed, would fall on the law side of the Federal court, then it should be remanded. *Gombert v. Lyon*, 80 Fed. 305; *Cates v. Allen*, 149 U. S. 460, 37 L. ed. 808, 13 Sup. Ct. Rep. 883, 977. Consent cannot remand. *Lawton v. Blich*, 30 Fed. 641.

How Issue Joined and Tried.

We have already seen how the issue is to be joined and tried when diverse citizenship is put in issue.

The existence of a Federal question, we have seen, must appear in the case as made by the plaintiff's petition in the State court, and cannot be raised by the petition to remove; so the issue in the motion to remand must rest upon the statements in plaintiff's original or amended petition in the State court.

The burden is on the removing party (*Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232), to sustain jurisdiction. See *Thresher v. Western U. Teleg. Co.* 148 Fed. 649.

Fraudulent Joinder.

Again, we have seen that the plaintiff cannot fraudulently join parties as defendants in order to evade Federal jurisdiction and prevent removal. If the fact exists, the petition for removal may set it up, and the issue is to be tried in the Federal court. *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896; *McGuire v. Great Northern R. Co.* 153 Fed. 434; *Kelly v. Chicago & A. R. Co.* 122 Fed. 289; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Prince v. Illinois C. R. Co.* 98 Fed. 1. The allegation of the jurisdictional fact, being taken as *prima facie* true, is

sufficient for the removal. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 170; *Kelly v. Chicago & A. R. Co.* 122 Fed. 289; *Ross v. Erie R. Co.* 120 Fed. 703. See sec. 37, chap. 3, of the new Code (Comp. Stat. 1913, sec. 1019).

When the petition for removal alleges the fact of a fraudulent joinder, it is the practice of some of the Federal courts to require an issue to be raised, or, upon failure to do so, the truth of the petition is presumed, and the case will not be remanded; while, in other jurisdictions, the petition is treated as traversed without express denial, and on motion to remand to place the burden of proving such allegations on the defendant. *Boatner v. American Exp. Co.* 122 Fed. 714.

This latter ruling is based on *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203, in which the Supreme Court says that the removal cannot be maintained unless the petitioner both alleges and proves that the defendants were wrongfully joined for the purpose of preventing a removal. *Wecker v. National Enameling & Stamping Co.* 204 U. S. 182, 183, 51 L. ed. 434, 435, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 210, 211.

There is no question that an action brought in a State court for a tort against several, or where the plaintiff has a legal right to bring a joint action, that neither of the defendants can remove the same to a Federal court, even though the plaintiff may have brought the action against each defendant separately. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Knuth v. Butte Electric R. Co.* 148 Fed. 73; *Atlantic Coast Line R. Co. v. Daniels*, 175 Fed. 302.

As to how the suit is to be brought is entirely within the discretion of the plaintiff; so, when the petition is filed, if fraudulent joinder be charged and the cause removed, the Federal court must determine the right of removal by the petition as filed by the plaintiffs; that is, it must act on the record as made in the State court when the petition for removal was filed. It will so act when a motion to remand is made, unless the moving petitioner proves his allegations of fraudulent joinder. This right to elect whether the suit shall be joint or several must be overcome when the suit is brought against

several defendants, by the removing defendant, by allegation and proof that the joinder was fraudulent, otherwise the suit as brought must control upon motion to remand. *Louisville R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Charman v. Lake Erie & W. R. Co.* 105 Fed. 449; *Bryce v. Southern R. Co.* 122 Fed. 710; *Prince v. Illinois C. R. Co.* 98 Fed. 2; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 452; *Alabama, G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 750, 751.

So we see that the issue is raised between the petition for the plaintiff and the allegations for removal, and it is not necessary to specially deny the allegations of the removal petition in order to remand.

Nature of Proof.

In order to justify a removal on the ground of fraudulent joinder, it must appear not only that they were not joined for that purpose, but that no cause of action is stated against them, or that they are, in law, improperly joined, or that the allegations of the petition joining therein a common liability are so palpably untrue or unfounded as to make the want of good faith of the plaintiff apparent. *Winters v. Drake*, 102 Fed. 550; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745, 746; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 638; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; *McGuire v. Great Northern R. Co.* 153 Fed. 434.

The burden of proof is on the removing party to show the fraudulent joinder. *Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232; *Thresher v. Western U. Teleg. Co.* 148 Fed. 649; *Bryce v. Southern R. Co.* 122 Fed. 709; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 211; *Woodson County v. Toronto Bank*, 128 Fed. 157. As to cases for remanding, see *International & G. N. R. Co. v. Hoyle*,

79 C. C. A. 128, 149 Fed. 180; Utah-Nevada Co. v. De Lamar, 75 C. C. A. 1, 145 Fed. 505; Mathews Slate Co. v. Mathews, 148 Fed. 490; Goldberg, B. & Co. v. German Ins. Co. 152 Fed. 832; Helena Power Transmission Co. v. Spratt, 146 Fed. 311; People's United States Bank v. Goodwin, 160 Fed. 727.

If a cause is properly removable it will not be remanded because the procedure was irregular. Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 149 Fed. 321.

Costs in Remanding.

Judicial Code, sec. 37 (Comp. Stat. 1913, sec. 1019); *Bowens v. Chicago, M. & St. P. R. Co.* 215 Fed. 287; *Western U. Teleg. Co. v. Louisville & N. R. Co.* 208 Fed. 581.

CHAPTER CXXVIII.

RECASTING PLEADINGS.

In jurisdictions, where legal and equitable causes of action may be joined, we have often causes removed from the State to the Federal courts in this condition. The equitable cause cannot be tried on the law side, nor the action at law on the equity side, nor even an equitable defense permitted. *Northern P. R. Co. v. Paine*, 119 U. S. 563, 30 L. ed. 514, 7 Sup. Ct. Rep. 323; *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Pettus v. Smith*, 117 Fed. 967; *India Rubber Co. v. Consolidated Rubber Tire Co.* 117 Fed. 354; *Mulqueen v. Schlichter Jute Cordage Co.* 108 Fed. 931; *Berkey v. Cornell*, 90 Fed. 717; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 83, 84; *Lerma v. Stevenson*, 40 Fed. 359; *Smythe v. Henry*, 41 Fed. 715; *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 271. So it becomes necessary to recast the pleadings in order that the equitable cause of action may be prosecuted according to the procedure and usages of courts of equity. *Thornton N. Motley Co. v. Detroit Steel & Spring Co.* 130 Fed. 396; *Re Foley*, 76 Fed. 390; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Stockton v. Oregon Short Line R. Co.* 170 Fed. 633; *Fletcher v. Burt*, 63 C. C. A. 201, 126 Fed. 619-621; *Phelps v. Elliott*, 23 Blatchf. 470, 26 Fed. 881; *Benedict v. Williams*, 20 Blatchf. 276, 10 Fed. 208; *Hurt v. Hollingsworth*, 100 U. S. 103, 25 L. ed. 570; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689. As the case becomes one in law or equity as the nature of the case demands. *North Alabama Development Co. v. Ormond*, 5 C. C. A. 22, 13 U. S. App. 215, 55 Fed. 20; *Wilson v. Smith*, 66 Fed. 81. See *Detroit v. Detroit City R. Co.* 55 Fed. 569. Where the case was in Chancery in the State court and removed and by the State equity rules the defendant may have affirmative relief set up

in his answer, the defendant need not recast his pleadings by setting up his case by cross bill.

When the case is removed, then the clerk docket it. If the case is purely equitable, such as mere foreclosure of a mortgage, the clerk by request can at once assign it to the equity docket, but if purely legal, such an action to try title or simply recover money, he may assign it at once to the law docket. Should the case be equitable in its nature and not placed on the equity docket, either party may move the court for a transfer to the proper docket. *United States Bank v. Lyon County*, 48 Fed. 634; *Dancel v. United Shoe Machinery Co.* 120 Fed. 840. You may use the following form:

Title as in case.

In the United States District Court
for the District of....., sitting
at

And now comes.....(plaintiff or defendant) in the above cause and shows to the court that this is a suit to recover certain taxes and to foreclose a tax lien thereon for the amount of said taxes, with a prayer for foreclosure of the lien (or whatever may be the cause of action showing that it is a case in equity), and the.....says that the relief sought can be more fully granted in equity than on the law side of this Honorable Court, wherefore he prays that said cause be transferred to the equity docket for trial.

R. F.,
Attorney of Record.

Issue may be taken on the motion, and the case shown to be fully remediable at law.

If the cause is transferred to the equity side of the docket, the court may order the pleadings changed to conform to the equity rules, or it may be required on the motion of either party, in which event the court orders the bill to be filed by a certain time and the defendant to demur, plead or answer by a certain other time, usually pursuing the time permitted by the rules. *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. ed. 569.

The plaintiff may recast his pleading as soon as the order is made transferring his case to the equity side, without any order of court or motion to require or permit it. You must bear in mind that as soon as your case is docketed as an equity suit, you must pursue the equity rules in preparing it for hearing. S. Eq.—55.

ing on the merits, and you at once become subject to the penalties for noncompliance with them. Rule 19 C. C. A.; *Utah-Nevada Co. v. De Lamar*, 75 C. C. A. 1, 145 Fed. 507.

If the plaintiff elects to stand on his pleading as it comes from the State court, which in a simple foreclosure you may do if your petition has been properly drawn in the State court (*Phelps v. Elliott*, 23 Blatchf. 470, 26 Fed. 883), you must so state in answer to the order to replead if one has been made, and file your reply as notice to the defendant to answer within the rules. Thus, where a case in equity in a State court has been removed, and the chancery rules of that State permit affirmative relief to be set up by way of cross bill in the answer, you need not file cross bill. *Detroit v. Detroit City R. Co.* 55 Fed. 569, 570.

In case no order has been made to recast your pleadings, and you have elected to stand on your petition as filed in the State court, you should at once notify the defendant so that he may answer by the next rule day as required, and if so notified and he does not plead under the rules, you may enter a judgment *pro confesso*.

Sometimes the defendant has, in advance of the day he is required to plead in the State court, filed a demurrer and general issue in said court, and the case, though an equitable one, comes up to the Federal court when removed with the issue so joined. Such a paper is neither good as a demurrer or answer to a suit in equity in the Federal court, and if the cause has been transferred to the equity side, will not be noticed, and consequently will not prevent a judgment *pro confesso*, if the defendant has not answered under the rules. The defendant being notified that the cause is upon the equity side of the docket, and that the plaintiff stands upon his pleading as it came from the State court, or that the plaintiff has recast his pleadings and filed his bill, must answer within the rules as heretofore explained.

But sometimes the case as it comes from the State court carries two distinct causes of action: one equitable and the other legal. It may be necessary to divide them, retaining the legal cause of action on the law side and transferring the equitable cause to the equity side, and thus have the divided

suits pending at the same time. C. C. rule 19, 75 C. C. A. 1, 145 Fed. 507; Perkins v. Hendryx, 23 Fed. 418; Lacroix v. Lyons, 27 Fed. 403; Stockton v. Oregon Short Line R. Co. 170 Fed. 633; Utah-Nevada Co. v. De Lamar, 75 C. C. A. 1, 145 Fed. 505-507.

To illustrate: You may have a simple money claim against the defendant, evidenced by a note, and you may have a claim evidenced by a note, but the latter secured by a mortgage. You may sue the defendant in the State court on both causes of action in the same suit. The defendant appears in the State court and on sufficient ground removes the cause to the Federal court; here there is no question, you must divide your suit and carry your foreclosure to the equity side. To do this you must necessarily recast your pleadings.

If each note is in excess of three thousand dollars, exclusive of interest and costs, there is no difficulty as you have the necessary amount to give the Federal court jurisdiction on either side of the divided system. But suppose neither note is for three thousand dollars, or one of the notes was under and the other exceed the jurisdictional amount, clearly the court must remand the case, unless the plaintiff waives the foreclosure and sues on the law side for the aggregated amount of the two notes. If one note is in excess and the other under the amount, the Federal court by the removal may retain jurisdiction of the note in excess of three thousand dollars, but cannot retain jurisdiction of the other, unless the equitable phase of the case has been abandoned and the amounts aggregated.

Often cases go up from the State court in which ancillary process has been sued out to preserve the subject-matter or status until the judgment at law can be recovered. If in such cases the ancillary proceeding is an equitable proceeding, such as an injunction, the pleadings must be recast and the injunction carried to the equity side of the docket.

Again, your cause of action may be legal, but an equitable remedy be sought. This fact would carry your case to the equity docket, for, as we have seen, courts of equity take jurisdiction, both when the cause of action or the remedy sought is equitable. However, it seems that when a remedy in equity is given by a State statute, and a suit is brought in the State court

under the statute, and is removed on ground of diversity of citizenship to the Federal court, the case should be remanded if the case as made in the State court is not within the equity jurisdiction of the Federal court and not require the pleadings to be recast. *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; *Mathews Slate Co. v. Mathews*, 148 Fed. 490; *Peters v. Equitable Life Assur. Soc.* 149 Fed. 290; *Knoxville v. Southern Paving Constr. Co.* 220 Fed. 237; *Gombert v. Lyon*, 80 Fed. 305.

If the object of the suit is to obtain a perpetual injunction, or any other essential equitable remedy, you must go to the equity side, even though damages are involved and are prayed for. *Du Pont v. Abel*, 81 Fed. 535.

APPENDIX

THE JUDICIAL CODE

CHAPTER TWO.

DISTRICT COURTS—JURISDICTION.

Sec.

24. Original jurisdiction.

Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.

Sec. 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

CHAPTER THREE.

DISTRICT COURTS—REMOVAL OF CAUSES.

Sec.

28. Removal of suits from State to United States district courts.

29. Procedure for removal.

30. Suits under grants of land from different States.

31. Removal of causes against persons denied any civil rights, etc.

32. When petitioner is in actual custody of State court.

33. Suits and prosecutions against revenue officers, etc.

34. Removal of suits by aliens.

35. When copies of records are refused by clerk of State court.

- 36. Previous attachment bonds, orders, etc., remain valid.
- 37. Suits improperly in district court may be dismissed or remanded.
- 38. Proceedings in suits removed.
- 39. Time for filing record; return of record, how enforced.

Sec. 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States; or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court

from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Sec. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the grounds of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

Sec. 30. If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such informa-

tion may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Sec. 31. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

Sec. 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of

said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

Sec. 33. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law: or when any suit is commenced against any person for on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpcena, petition, or other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by capias or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual

custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

Sec. 34. Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

Sec. 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

Sec. 36. When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Sec. 37. If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

Sec. 38. The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.

Sec: 39. In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding such State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

CHAPTER FOUR.

DISTRICT COURTS—MISCELLANEOUS PROVISIONS.

Sec.

- 50. When a part of several defendants can not be served.
- 51. Civil suits; where to be brought.
- 52. Suits in States containing more than one district.
- 53. Districts containing more than one division; where suit to be brought; transfer of criminal cases.
- 54. Suits of a local nature, where to be brought.
- 55. When property lies in different districts in same State.
- 56. When property lies in different States in same circuit; jurisdiction of receiver.
- 57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.
- 58. Civil causes may be transferred to another division of district by agreement.
- 65. Receivers to manage property according to State laws.
- 66. Suits against receiver.
- 68. Certain persons not to be masters or receivers.

Sec. 50. Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

Sec. 52. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate

writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

Sec. 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States district court in such division.

Sec. 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

Sec. 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which said court is constituted.

Sec. 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the

circuit court of appeals for such circuit, or by a circuit judge thereof; after a reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Sec. 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting

aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon such suit shall be proceeded with to final judgment according to law.

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the value laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year or both.

Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Sec. 68. No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

CHAPTER SIX.

CIRCUIT COURTS OF APPEALS.

Sec.

128. Jurisdiction; when judgment final.

129. Appeals in proceedings for injunctions and receivers.

132 Allowance of appeals, etc.

Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Sec. 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, That the court below may, in its discretion, require as a condition of the appeal an additional bond.

Sec. 132. Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

CHAPTER TEN.

THE SUPREME COURT.

- 233. Original disposition.
- 234. Writs of prohibition and mandamus.
- 235. Issues of fact.
- 236. Appellate jurisdiction.
- 237. Writs of error from judgments and decrees of State courts.
- 238. Appeals and writs of error from United States district courts.

Sec. 233. The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

Sec. 234. The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

Sec. 235. The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

Sec. 236. The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for.

Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty,

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statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

CHAPTER ELEVEN.

PROVISIONS COMMON TO MORE THAN ONE COURT.

Sec.

256. Cases in which jurisdiction of United States courts shall be exclusive of State courts.

261. Writs of ne exeat.

262. Power to issue writs.

263. Temporary restraining orders.

264. Injunctions; in what cases judge may grant.

265. Injunctions to stay proceedings in State courts.

266. Injunctions based upon alleged unconstitutionality of State statutes; when by whom may be granted.

267. When suits in equity may be maintained.

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.

Sec. 261. Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted

unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Sec. 262. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sec. 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

[This section repealed by act Oct. 15, 1914 (38 Stat. at L. 737, chap 323), specifying how preliminary injunctions shall be issued.]

Sec. 264. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

Sec. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall imme-

diately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Sec. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Judicial Code, § 274a. (Act March 3, 1915, 38 Stat. at L. 956, chap. 90.) Amendments to pleadings in suits at law which should have been brought in equity, or in suits in equity which should have been brought at law.

In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

Sec. 274b. (Act March 3, 1915, 38 Stat. at L. 956, chap. 90.) Equitable defenses and equitable relief in actions at law; review of judgments or decrees in such cases.

In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by

appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

Sec. 274c. (Act March 3, 1915, 38 Stat. at L. 956, chap. 90.) Amendments to show jurisdiction based on diverse citizenship of parties.

Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

PAGES OF TEXT UPON WHICH SECTIONS OF THE JUDICIAL CODE ARE REFERRED TO OR DIS- CUSSED.

- Section 24, pp. 41, 42, (2-25) 47, 63. Cl. 16, p. 87, (1) 91, 95, (1, 2-25) 168, 210. 183. Par. 21, p. 317, 775, 809, 812, 815, 824, 828, 834.
- Section 28, pp. 66, 70, 774, 775, 776, 777, 792, 804, 809, 811, 812, 815, 828, 829, 833, 834, 842, 843, 846.
- Section 29, pp. 776, 778, 779, 782, 788, 799, 834, 842.
- Section 33, p. 811.
- Section 34, p. 811.
- Section 36, p. 789.
- Section 37, pp. 66, 130, 199, 548, 803, 857, 861, 863.
- Section 38, pp. 789, 790, 838.
- Section 39, p. 781.
- Section 46, p. 131.
- Section 49, p. 145.
- Section 50, p. 101.
- Section 51, pp. 48, 53, 92, 94, 96, 100, 110, 314, 316, 333, 833.
- Section 52, pp. 48, 98, 105, 107, 108, 313, 316.
- Section 53, pp. 48, 108, 134, 333, 313, 316.
- Section 54, pp. 49, 100, 313, 316.
- Section 55, pp. 100, 313, 316.
- Section 57, pp. 48, 49, 102, 103, 237, 336, 337.
- Section 58, pp. 108, 134.
- Section 66, pp. 162, 181, 256.
- Section 128, p. 622.
- Section 129, pp. 626, 627, 628, 629.
- Section 132, p. 676.
- Section 233, p. 41.
- Section 234, p. 41.
- Section 236, p. 241.
- Section 237, pp. 41, 154, 746.
- Section 239, pp. 735, 737.
- Section 241, p. 741.
- Section 252, p. 745.
- Section 256, pp. 41, 47.
- Section 261, pp. 284, 285, 480, 481.
- Section 262, p. 41.
- Section 263, p. 474.
- Section 264, p. 471.
- Section 265, pp. 475, 476.
- Section 266, pp. 471, 472, 473, 475.
- Section 267, p. 22.
- Section 274 (b) p. 8.
- Section 274 (c) pp. 132, 207.
- Section 274 (a) p. 552.
- Section 289, p. 42.
- Section 294, p. 42.
- Section 297, pp. 42, 108.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES

RULE.

1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES— ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or at the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders, and other proceedings which are grantable of course.

3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit,

all process issued and returns made thereon, and all appearances, shall be noted briefly and chronologically in this book on the folio assigned to the suit, and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course, and also all orders made or passed by the judge in chambers

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees, and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book, and Equity Journal shall be kept by the clerk under the direction of the court.

4.

NOTICE OF ORDERS.

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor, and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes. If the public interest permits, the senior

circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

7.

PROCESS, MESNE AND FINAL.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof

made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

12.

ISSUE OF SUBPŒNA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there is more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

13.

MANNER OF SERVING SUBPŒNA.

The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

14.

ALIAS SUBPŒNA.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.

15.

PROCESS, BY WHOM SERVED.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna, as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

17.

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—
SETTING ASIDE DEFAULT.

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

18.

PLEADINGS—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

20.

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent, or scandalous matter stricken out, upon such terms as the court shall think fit.

22.

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

23.

MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties,—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant, the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

27.

STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing, at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case, in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered.

30.

ANSWER—CONTENTS—COUNTERCLAIM.

The defendant in his answer shall, in short and simple terms, set out his defense to each claim asserted by the bill, omitting any mere statement of evidence, and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and cross claims.

31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge; but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered as in default of an answer to the bill.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer

within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had upon an omission to put in an answer.

33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off, or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter.

34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court, rendered after the commencement of the suit determining the matters in controversy, or a part thereof.

35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public.

37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons who might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought
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against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties, taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

44.

DEFECT OF PARTIES—TARDY OBJECTION.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the

objection and therein specified by name or description the parties to whom the objection applies. the court shall be at liberty to make a decree saving the rights of the absent parties.

45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted, and for the filing of such pleadings or amendments as may be necessary.

46.

TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—
RULINGS ON OBJECTIONS TO EVIDENCE.

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

47.

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue;

those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND
TRADEMARK CASES.

In a case involving the validity or scope of a patent or trademark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial; and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be

in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

52.

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER,
MASTER, OR EXAMINER.

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master, or examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

53.

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

54.

DEPOSITIONS UNDER REV. STAT §§ 863, 865, 866, 867—
CROSS-EXAMINATION.

After a cause is at issue, depositions may be taken as provided by §§ 863, 865, 866, and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge, under all the circumstances, shall order.

55.

DEPOSITION DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES
ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court, upon good cause shown by affidavit, and upon such terms as the court shall, in its discretion, impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties, and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year, upon application to the court by either party, in

which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

58.

DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff, at any time after filing the bill, and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer, and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof, stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper, upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully, and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out, and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter, or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter, or writing shall be paid by the party refusing or neglecting to make such admission, unless, at the trial, the court shall find that the refusal or neglect was reasonable.

59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer

brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding, in any cause or matter, may be used before the master.

65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to

him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay \$5 costs to the other party, and for every exception allowed shall be entitled to the same costs.

68.

APPOINTMENT AND COMPENSATION OF MASTERS.

The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause

on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

71.

FORM OF DECREE.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, *viz.:*" (Here insert the decree or order.)

72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

73.

PRELIMINARY INJUNCTIONS AND TEMPORARY
RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without

notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying, or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being

omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete, and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge, and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule, and shall be covered by the directions which the court or judge may give on the subject.

76.

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS—
CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper, and to exclude the formal and immaterial parts of all exhibits, documents, and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof,

may prepare and sign a statement of the case, showing how the questions arose and were decided in the district court, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

78.**AFFIRMATION IN LIEU OF OATH.**

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

79.**ADDITIONAL RULES BY DISTRICT COURT.**

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

80.**COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.**

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

81.**THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES
ABROGATED.**

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then-pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

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